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THE LAW OF WILLS.

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EMBRACING

THE PROBATE OF WILLS AND THE SETTLEMENT OF ESTATES;
THE DUTIES OF EXECUTORS, ADMINISTRATORS, AND
OTHER TESTAMENTARY TRUSTEES.

BY

ISAAC F. REDFIELD, LL.D.

VOL. III.

THIRD EDITION.

GREATLY EXTENDED AND IMPROVED.

BOSTON:
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PREFACE TO THE THIRD EDITION.

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THIS portion of our work on Wills, in its present form, has received very large additions, considerably exceeding a hundred pages in all; embracing a large number of new titles, which will render it far more complete than in the former editions, and will, we believe, commend it to the acceptance of the profession as both thorough and accurate, — so far as any work upon so extensive a subject, among such diversities of legislation and decisions, can be expected to be. The portion on Trusts has been restricted, mainly, to such as are of a testamentary character, as being all which could properly be embraced in a work of this kind; and, in this form, is made more complete than in the former edition, which seemed not only more germane to the work, but likely to be more useful to the profession, than to have attempted to embrace the entire scope of the Law of Trusts in so short space.

We have received such repeated and uniform assurances, both from Probate Judges and executors and administrators, as well as the profession generally, that a volume devoted exclusively to the "Settlement of Estates" is imperatively demanded, that we can entertain no doubt of the fact; and we have done the best we could to have this meet the demand, having improved and perfected this edition, greatly beyond what we were able to do before. The generous manner in which our former efforts have been

accepted by the profession gives us some confidence that we have not wholly failed in this our last effort to serve them. While this book is designed mainly for the active members of the legal profession, we feel that it must be of essential aid to all connected with the settlement of estates.

The work on Wills is now as complete as we could make it, within any reasonable compass ; and we believe it will be found to contain all which could fairly be expected in such a work, and in a form not obnoxious to just complaint. And it is a great satisfaction to have been able to leave the work in a shape which we have reason to believe will be satisfactory to our professional brothers, for whom we have labored so perseveringly through a very long professional life, and from whom we have received so many tokens of confidence and respect ; for all which we here tender them our most sincere, most grateful thanks.

I. F. R.

BOSTON, March 10, 1876.

JUDGE REDFIELD died very soon after the foregoing Preface was written, and the care of his books was placed in my hands by his representatives. As some months elapsed after his death before the printing of this volume was commenced, I have cited the more important cases reported in the mean time, without comment. Otherwise the book is published in all respects as he left it.

WM. A. HERRICK.

BOSTON, June 27, 1877.

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EMBRACING ALL TRUSTS GROWING OUT OF THE SETTLEMENT OF ESTATES, AND FOR THE BENEFIT OF THOSE DERIVING PROPERTY THEREFROM.

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THE LAW OF WILLS.

PART III.

THE PROBATE OF WILLS AND THE DUTIES OF EXECUTORS,
ADMINISTRATORS, AND OTHER TESTAMENTARY TRUS-
TEES; THE SETTLEMENT AND DISTRIBUTION OF
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CHAPTER I.

THE PROBATE OF WILLS.

SECTION I.

PRELIMINARIES TO THE PROBATE.

1. The death of the testator is requisite to give the court of probate jurisdiction.
- n. 1. The modes of establishing this proposition. Presumptions of survivorship.
2. The will should be presented for probate in the shortest convenient time.
3. The executor should prove the will, or produce it and resign his trust.
- n. 2. 3. Discussion of the early English practice upon these points.
4. Any person interested, or who believes himself interested, may petition for citation to have the will brought into court.
- n. 3. The court may appoint an administrator ad interim.
5. Any one having custody of will may be cited to produce the same.
- n. 6. An attorney or solicitor can have no lien upon will.
6. Mode of proving lost wills.
- n. 11. Cautions in regard to admitting such wills except upon clear proof.
7. Where will is purposely suppressed, legatees may have redress in equity.
8. All papers referred to in will to be deposited in registry of probate.
- n. 14. Original will may be taken out of registry by order of court.
9. and n. 16. Courts of equity will not assume or control the probate of wills, but will set aside probate fraudulently obtained.

§ 1. 1. THE first thing to be considered in regard to the last will and testament of any person is the death of the testator, which alone can give such an instrument conclusive force and operation,

* 4 * or give the courts jurisdiction of its probate. Before the death of the testator the will is merely inchoate, or deliberative, intended to become operative in the event of death, but liable at any moment to be altered or annulled.¹

¹ It seems to have been the practice of the English ecclesiastical courts, from an early day, to allow the proof of a will, and the recording of it among the wills of the office, during the life of the testator, at his request, but not at the request of the executor, or of any other person. But this was merely a precautionary measure against the loss of the instrument. and no authentication of the probate could be delivered out until after the decease of the testator. Swinb. pt. 6, § 13, pl. 1.

The registry of probate is still made the depository of the wills of testators, during their lives, if they desire. in England and some of the American states. Gen. Statutes Mass. ch. 92, §§ 12, 13, 14, 15.

The proof of the death of the testator will vary according to circumstances. In the majority of cases, the thing will be of such common notoriety that nothing more will be required. But there are some cases — where the testator was domiciled abroad, or dies away from home and in a remote country — that it will not be convenient to adduce direct proof of the fact. In such cases, the early writers entered into many ingenious speculations, all of which result in the court acting either upon the ordinary presumption of death from the absence of the testator for seven years without being heard from, or for a less term, where the probabilities of death are corroborated by circumstances; or where reliable reputation of the fact and manner of his death has reached the neighborhood of the testator's residence; or, in case of his being domiciled abroad, where such reputation has reached his friends and relatives in such form as to gain general credit. Swinb. pt. 6, § 13; 1 Wms. Exrs. 290, 291, and n.

In some cases, although holding that the absence of a person from the state, without being heard from, for any period short of seven years, is not sufficient to raise a legal presumption of his death, it has been considered that where letters of administration had been granted after an absence of three years, and a suit had been brought upon a promissory note payable to the intestate, without any plea in abatement being interposed, that a conclusive presumption of the death of the intestate arose from the above facts. *Newman v. Jenkins*, 10 Pick. 515. We apprehend the presumption would be *prima facie* in favor of the decease if a plea in abatement were interposed, but open to proof that the testator is still living.

We cannot refer to the cases in detail upon the presumption of the continuance of life from absence, or other cause. The general rule is, that such presumptions are to be regarded as mere presumptions of fact, to be weighed by the jury in connection with the attending circumstances. But, for convenience, the period of seven years has been fixed as the limit of the *prima facie* presumption of death, in the absence of all circumstances tending to the contrary.

A nice question sometimes arises in regard to survivorship among different

* 2. The time of the probate after the death of the testator * 5 has sometimes been made a question. But no definite rule

persons exposed to the same peril, and not known to have survived. The former rules of the English courts seemed to admit of considerable refinement as to the probabilities of the continuance of life in reference to age, sex, &c. It was accordingly sometimes said that a man would be presumed to survive a woman of about the same age, and that children under the age of puberty and aged persons, would be presumed to die sooner under the same exposure than those in the vigor of life. There is doubtless something in these circumstances worthy of being taken into account in determining such questions, as matters of fact. But the more recent English cases seem to regard such considerations as much less conclusive than formerly. In *Underwood v. Wing*, 1 Jur. N. s. 169, s. c. 4 DeG., M. & G. 633, *Wightman, J.*, said: "We may guess, or imagine, or fancy, but the law of England requires evidence; and (in a case of this kind) we are of opinion there is no evidence upon which we can give a judicial opinion that either survived the other." The opinion was confirmed by the Lord Chancellor. See *Best, Princ. of Evid.* 478, 2d ed.

So that we may now conclude, that although all these considerations may be urged, and the testimony of experts taken upon the points, the courts and the triers of the fact are at liberty to set them aside, and to be governed by their own views of probability and propriety, as to the fact of survivorship in any particular case. See post, § 50, pl. 3, and n.

In an English case upon the main point discussed in this note, proof of the death of the testator being required to give the court jurisdiction, where the testator was an officer in the army, on the affidavit of his brother and executor, that he had received intelligence of his being killed in battle, and that he believed it to be true, probate was granted of the will. But upon the testator coming into court, in full life, the court revoked the same, and declared it to be null and void to all intents, and decreed the original will, together with the probate, being first cancelled, to be delivered to the testator. *Napier in re*, 1 Phillim. 83. As to what will be regarded as evidence of the decease of one abroad, see *Wainwright in re*, 1 S. & Tr. 257; *Danby v. Danby*, 5 Jur. N. s. 54.

Presumption of continuance of life extends through the term of seven years' absence, and after that period the presumption is reversed, and those who allege the continuance of life must adduce proof of the fact. *Crawford v. Elliott*, 1 Hous. 465. It seems to be settled that although seven years' absence, unheard of, is ground of presuming the death of a person, there is no particular presumption as to the time of the death during that period, and that it is therefore incumbent upon the party claiming the death, at any particular time during that period, to assume the onus of establishing that fact. *Doe v. Nepean*, 5 B. & Ad. 86; s. c. 2 M. & W. 894; s. p. *Smith v. Knowlton*, 11 N. H. 191; *Burr v. Sim*, 4 Whart. 150; *Bradley v. Bradley*, id. 173; *White-side's Appeal*, 23 Penn. St. 114; *Primm v. Stewart*, 7 Texas, 178. The fact that the person had been absent, and reputed dead in the family, and that the

* 6 can be * laid down in regard to it. It should be done within such reasonable, decent, and convenient time, as the circum-

witness, being one of the family, had never heard of his marriage, is *prima facie* evidence that he was dead without lawful issue. *Doe d. v. Griffin*, 15 East, 293.

In *Watson v. England*, 14 Sim. 28, it was held that a person ought not to be presumed dead, from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of, though alive. And it is here said that the old law, in regard to the presumption of death, is becoming more and more untenable, in consequence of the increased facility of travelling, and we might add, the consequent disposition to change location, and to wander from place to place. And the same view is maintained in other cases. *Dowley v. Winfield*, id. 277; *Stevens v. McNamara*, 36 Maine, 176. See, also, *Dean v. Davidson*, 3 Hagg. 554; *Bowden v. Henderson*, 2 Sm. & G. 360.

The presumption of death from absence, without being heard from, will be rebutted by others besides the family having heard from the person as living within seven years. *Flynn v. Coffee*, 12 Allen, 133.

When a person has been absent and not heard from, or of whom no account can be given, the presumption of life ceases at the end of seven years from the period when he was last heard from. *Whiting v. Nicholl*, 46 Ill. 230. But no presumption arises in regard to the particular time when death occurred; the party interested in showing the death at any particular time assumes the burden of proof, and is at liberty to show it by any facts or circumstances satisfactory to the triers. *Ib.*

The subject of the presumption of death and the time such presumption arises in a particular case has been very carefully and minutely examined in the English courts of equity, within the last few weeks (1870), in *Re Phene's Trusts*, 17 W. R. 1087, before Vice-Chancellor *James*; s. c. 18 id. 303; s. c. L. R. 5 Ch. App. 139, before Lord Justice *Giffard* in the Court of Chancery Appeal. In the opinion of the latter will be found a careful review of the authorities. The following propositions are maintained by the learned judges:—

There is a presumption of law that a person who has not been heard of for seven years is dead; but there is no presumption of his death at any particular period of the seven years. There is no legal presumption that a person shown to be alive at a given time has continued to live for any particular period after that given time.

A person whose title depends upon A. having survived B. must prove that fact affirmatively by some positive evidence. The amount will depend upon circumstances, but it must be satisfactory to the triers. The case of *Re Benham's Trust*, Law Rep. 4 Eq. 416; 15 W. R. 741, is reviewed and disapproved. The review of the cases by this learned and accurate judge, Lord Justice *Giffard*, is so exceedingly satisfactory and so little accessible to the profession generally in this country, and the point is so liable to arise where a

stances may indicate ; * or not so soon as to imply irreverent * 7 haste, and not so remote as to suggest special motive for the delay.²

full view of all the English decisions is desirable, and where many of them, if known, cannot be reached, that we venture to make a considerable extract from it.

“ It will be desirable, therefore, to examine those cases and such others as bear materially on the subject, before dealing with the evidence more particularly. The cases decided by the Vice-Chancellor *Kindersley* were *Lambe v. Orton*, 8 W. R. 111; *Dunn v. Snowden*, 11 W. R. 160, 2 Dr. & Sm. 201; and *Thomas v. Thomas*, 13 W. R. 225; s. c. 2 Dr. & Sm. 298. They were all decided on the same general principles. The propositions enunciated were, in substance, these: 1st. That the law presumes a person who has not been heard of for seven years to be dead, but, in the absence of special circumstances, draws no presumption from that fact as to the particular period at which he died. 2d. That a per-

² In some of the early writers on wills, four months from the decease of the testator is named as the limit of the proper delay for the production of the will; and that in the event of the will, which was known to exist, not being produced for probate in that time, the Ordinary should sequester the goods of the deceased. *Godolph.* pt. 1, ch. 20, § 3; 1 Wms. Exrs. 291. The probate courts in this country, instead of sequestering the goods, will grant letters of administration to any proper person applying therefor. The time is now limited, in England, to six calendar months, by affixing a penalty for any one to interfere with the estate or effects of any deceased person within six calendar months after such decease, &c. 55 Geo. 3, ch. 184, § 37. By a modern regulation of the Prerogative Court of Canterbury, where probate of a will is applied for more than five years after the decease, some explanation should be given for the delay. In the *Goods of Darling*, 3 Hagg 561; 1 Wms. Exrs. 292.

In some of the American states there is no limit to the time beyond which a will cannot be proved. It is generally considered that a will more than thirty years old will require no proof where the title of real estate is concerned, and the devise is in favor of the possessor. 1 *Greenl. Evid.* §§ 21, 570. But in the American states, where the probate of the will more commonly extends to real as well as personal estate, the production of the will without probate will be of no avail, however ancient. See, as to the English rule, *Doe v. Wolley*, 8 Barn. & Cress. 22; *Jackson v. Christman*, 4 Wend. 277, 282; *Hall v. Gittings*, 2 Har. & Johns. 112.

By the standing rules of the present English Court of Probate, the several registrars of the court are prohibited from issuing probate or letters of administration with the will annexed in less than seven days, or simple letters of administration in less than fourteen days after the decease of the testator or intestate; and where a grant of probate or administration is for the first time applied for after the lapse of three years from the death of the decedent, the reason of the delay is to be certified, and an affidavit may be required, or the question referred to the judge.

- * 8 * 3. The executor is presumed to have the custody of the will, and he is the only person who can in the first instance

son alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards. And, 3d, that the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period. The case decided by the Vice-Chancellor *Malins* was *Re Benham's Trust*, 15 W. R. 741 ; s. c. L. R. 4 Eq. 416. He adopted and acted on the decisions of Vice-Chancellor *Kindersley*, but went somewhat further, laying it down 'that if you cannot presume death at any particular period during the seven years, then, at the end or expiration of the seven years, you must presume for the first time that he is dead, and you must also presume that within that time he is alive.' *Re Benham's Trust* was appealed, and the Lord Justice *Rolt*, in November, 1867, discharged the Vice-Chancellor's order, directing further inquiries, and simply stating, according to the only report I am aware of (16 W. R. 180), that 'there was no evidence for the court to act upon, and that it was a case, not of presumption, but of proof.' In *Dowley v. Winfield*, 14 Sim. 277, the testator died in September, 1833. One of his two sons went abroad in September, 1830, and was heard of for the last time about twenty months previously to his father's death. The court ordered a share of the father's residue bequeathed to him to be transferred to his brother as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason v. Mason*, 1 Mer. 308, a father and son were shipwrecked together. The rules of the civil law and of the Code Napoleon were relied on. Sir *William Grant* said : 'There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. . . . In the present case I do not see what presumption is to be raised ; and since it is impossible you should demonstrate, I think that, if it were sent to an issue, you must fail for want of proof.' An issue was directed whether the son was living at the death of the father. Nothing appears to have come of it. In *Underwood v. Wing*, 4 De G., M. & G. 633, which was also a case of commorientes, a testator bequeathed personal estate to J. W. in the event of his wife dying in his lifetime. The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and J. W., who claimed under the will, it was held, first, that the onus of proof that the husband survived his wife was upon J. W. ; secondly, that it was necessary to produce positive evidence in order to enable the court to pronounce in favor of the survivorship ; and thirdly, that, no such evidence having been produced, the next of kin were entitled.

"*Underwood v. Wing* was heard before Lord *Cranworth*, Mr. Justice *Wightman*, and Mr. Baron *Martin*. Mr. Justice *Wightman*, in the course of delivering judgment, stated : 'If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide, independent of age or sex ; and if there be no evidence, the case is the same as a great variety of other

properly prove * the same. But if there is any unreasonable * 9 delay in his taking proceedings in the matter, any one inter-

cases, more frequent formerly than at present, where no evidence exists, and, of consequence, no judgment can be formed;’ and afterwards added: ‘ We think there is no conclusion of law upon the subject; in point of fact, we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor.’ In *Wing v. Angrave*, 8 H. L. Cas. 183, another branch of the same case, the House of Lords concurred in the view which had been taken by Lord *Cranworth* and the learned judges who sat with him. In *Re Green’s Settlement*, L. R. 1 Eq. 288, Mr. Green was murdered in the Indian Mutiny on the 3d of June, 1857; Mrs. Green on the 16th of November following. Mr. and Mrs. Green’s child escaped with its native nurse on the same 3d of June, but was never afterwards distinctly heard of. After the lapse of seven years and upwards a petition was presented, and the present Lord Chancellor, then Vice-Chancellor, delivered the following judgment: ‘ I think the rule which the court should follow in this case is analogous to that laid down in *Underwood v. Wing*. The whole question is, on whom is the onus of proof thrown. The lady on the devolution of whose estate the question arises is shown to have died on the 16th of November; her husband is shown to have died before her. A number of persons claim as her relatives, and prove their kindred within a certain degree, and, so far as now appears, there is no one nearer in kindred. On the other hand, the representative of another person claims the property also, and shows that the person through whom he claims was nearer of kin than the petitioners, and would have been entitled if he survived his mother; but a person claiming under such a title must go further, and must show not only that the person through whom he claims would have been entitled if he survived, but that he actually was entitled, or, in other words, that he did survive. I am of opinion also that in this case there was some evidence to go to a jury that the child died in the mother’s lifetime; the letter of Mrs. Green shows that at the time it was written the child, an infant in arms, was separated from its father and mother, and was in the hands of a native female nurse, in a time and place when and where it was most improbable that it should escape destruction. But I do not rest my decision on this evidence, I prefer to rely on the grounds which I have before stated.’ There are three other cases in equity: viz., *Lakin v. Lakin*, 34 Beav. 443; *Re Beasley’s Trusts*, L. R. 7 Eq. 498, and *Re Henderson*, referred to in that case. In all of these the period of the death was inferred as a matter of fact from the circumstances proved; not in any sense presumed.

“ This appears to be the state of the authorities in the equity courts. The leading case, however, is one at law; viz., *Doe v. Nepean*, which is reported before the King’s Bench, 5 B. & Ad. 86, and before the Exchequer Chamber, 2 M & W. 894. In that case the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. M. Knight went to America. The last account that was heard of him was by a letter written by him from Charleston, and received in England in May, 1807. Eject-

* 10 ested may petition the * probate court to cite him before it, to show cause why he should not assume the execution of

ment was brought within twenty-five years from the date he was last heard of, and within twenty from the date of the right accruing, if he was to be taken to have died at the end of the seven years from 1807. The Court of King's Bench was of opinion that the lessor of the plaintiff, who gave no other evidence of M. Knight's death than his absence, failed in establishing that his death took place within twenty years before the ejectment brought. With reference to the argument of inconvenience, Lord *Denman* said: 'If, for the sake of preventing inconvenience, we were arbitrarily to lay down a rule that seven years' absence abroad (the party not having been heard of) was *prima facie* evidence of his death *at the end* of the seven years, such a rule would, in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth; and, as the rule would be applicable to all cases in which the time of death became material, would in many be productive of much inconvenience and injustice.' The Exchequer Chamber adopted the doctrine of the Court of King's Bench, in these terms; viz., 'we adopt the doctrine of the Court of Queen's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.' It is obvious from these passages that there is an inconsistency between that which the courts of King's Bench and Exchequer Chamber laid down, and what I have quoted from the judgment of the Vice-Chancellor *Malins*, as going beyond what was laid down by the Vice-Chancellor *Kindersley*. The Vice-Chancellor *Kindersley*, however, seems to have grounded his opinion on certain portions of these two judgments. There are, therefore, other parts of them which it will be desirable to quote and examine. Thus, in the Court of King's Bench it is stated: 'There is no doubt that the lessor of the plaintiff must recover by the strength of his own title, and, in order to do so, must prove that he had a right to enter on the lands sought to be recovered within twenty years from the ejectment brought; and consequently, as the presumption is that a person once alive continues so until the contrary is shown, the lessor of the plaintiff is bound to prove, first, the death of Matthew Knight; and, secondly, that it took place within twenty years before the ejectment brought.' And in the judgment of the Exchequer Chamber the following are the material passages bearing on this part of the subject: 'The court is called on to review the decision of the Court of King's Bench in *Doe v. Nepean*. The doctrine there laid down is, that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the arguments at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I., relating to bigamy; more particularly to the statute 19 Car. 2, c. 6, relating to this very matter,

the trust reposed in him by the will, * or else refuse the * 11 same; and by producing the will in court, enable the court to grant administration with the will annexed.³

the words of which distinctly point at the presumption of the *fact* of death, not of the *time*; it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex v. Inhabitants of Harborne*, 2 Ad. & E. 540. It is true the law presumes a person shown to be alive at a given time remains alive until the contrary be shown,

³ Swinb. pt. 6, § 12, pl. 1. See also 1 Salk. 309; 1 Wms. Exrs. 287. It seems to have been the early practice in England, upon return of the citation, to give the executor, if he desired it, longer time to deliberate whether he would accept the trust or not, and in the mean time to grant letters ad colligendum, for the purpose of collecting the effects of the deceased; but no such delay would now be expected. And where any considerable time has elapsed since the decease of the testator or intestate, letters of administration may be granted at once, even where a will is supposed to exist; to continue only till the executor shall prove the will, or some other steps shall be taken to compel its production. Such administration will answer all the purposes of the former English administration ad colligendum, and will be like that, temporary, if the executor proves the will, or be liable to be qualified by the production and proof of the will by any one. Swinb. pt. 6, § 4; 1 Wms. Exrs. 241, 242. Where the executors decline to offer a will for probate, any one claiming an interest under it may present it for probate; but it should appear that he is not a mere intruder. *Enloe v. Sherrill*, 6 Iredell, Law, 212; *Stone v. Huxford*, 8 Blackf. 452. So also a slave to whom his freedom is given by the will may present it for probate. *Ford v. Ford*, 7 Humph. 92. There seems to be no question of the right of an executor to renounce the trust, provided it be done before entering upon its duties. *Finch v. Houghton*, 19 Wis. 149. In this state and many others the executor is required to proceed in the probate of the will within a defined number of days after the decease of the testator, or else the probate court may grant letters of administration with the will annexed. By the standing rules of the English probate court, an executor having once renounced the trust is thereby rendered incapable of executing it. But such renouncing executor may take administration with the will annexed, as the attorney of the other executor. *Russell in re*, L. R. 1 P. & D. 634. See also *The Goods of Biggs*, id. 595. In the case of *The Goods of Gill*, 3 P. & D. 113, Sir *James Hannen* said he was not convinced that the court could not allow a renouncing executor upon sufficient ground to still act; but it should not be done upon the mere ground that he had changed his mind; it must appear that it would be advantageous to the estate or to the executor, that he should still be allowed to act. And it has been held, that where one of two executors had renounced, the other having subsequently been removed, he might retract such renunciation and receive letters testamentary. *Codding v. Newman*, 3 Thompson & C. (N. Y. Sup. Ct.) 364.

- * 12 * 4. Any person interested in the estate, as devisee or legatee under the will, or as creditor, probably, may petition

for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years; whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued; that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day: and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years.' The Vice-Chancellor *Kindersley* appears to have acted on the passages in both these judgments which are to the effect that the onus of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusion arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not, and ought not to be, any such presumption of law. If there was such a presumption, it would be no ground for throwing the onus of proof on the plaintiffs, where seven years had elapsed from the date of the last proof of existence; on the contrary, it would carry the period of death, as suggested and laid down by Vice-Chancellor *Malins*, to the end of the seven years. But both the decisions are that it did not, and because it did not the plaintiff failed, and did not recover the property he sought. In the recent case of *The Queen v. Lumley*, L. R. 1 Cr. Cas. Reserved, 1866, it was held, consistently with another judgment delivered by Lord *Denman* in *Rex v. The Inhabitants of Harborne*, 2 A. & E. 540, that there was no presumption of law in favor of the continuance of a life up to a particular period, but that it was a question for the jury as a matter of fact. The case was heard before the Chief Baron, Mr. Justice *Byles*, Mr. Justice *Lush*, Mr. Justice *Brett*, and Mr. Baron *Cleasby*; and Mr. Justice *Lush* delivered the judgment of the court in these terms: 'We are of opinion that the direction to the jury in this case, viz., that, there being no circumstances leading to any reasonable inference that he had died, Victor must be pre-

for such * citation against the executor.⁴ And it has been * 13 said that any one expecting a legacy may do this, “to the

sumed to have been living at the date of the second marriage, was erroneous. In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rex v. Twynning*, 2 B. & Ald. 386; *Rex v. Harborne*, and *Nepean v. Doe*, supra, appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage there is no question for the jury. The provision in the act then comes into operation and exonerates the prisoner from criminal culpability, though the husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature by this provision sanctions a presumption that a person who has not been heard of for seven years is dead; but the provision affords no ground for the converse proposition: viz., that where a party has been seen or heard of within seven years a presumption arises that he is still living. That, as we have said, is always a question of fact.’

“True it is that *The Queen v. Lumley* was a criminal case, and that the seven years had not elapsed from the date of the first husband having last been heard of; but, though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each should be so far different as that there should be a positive legal presumption in the one proceeding and no legal presumption in the other. A prosecutor and a person seeking to recover property each have to prove their case, and in each instance the object is to arrive at, and act upon, the real truth.’

“Lord Denman, who delivered both judgments in *Doe v. Nepean*, thus expressed himself in *The King v. The Inhabitants of Harborne*: ‘I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe v. Nepean* the question arose much as in *Rex v. Twynning*. The claimant was not barred if the party were presumed not dead till the expira-

⁴ Swinb. *ibid.*

intent that they may thereby be certified whether the testator left them a legacy.”⁵

tion of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption, there was nothing to be submitted to the jury. But this court held that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case, and *Rex v. Twynning* may be explained in the same way. I am aware that in this latter case Mr. Justice *Bayley* founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it.’ Other learned judges concurred in this opinion. The notion of a legal presumption in favor of life originated, I believe, with the civil law, and we have Sir *William Grant’s* opinion, in *Mason v. Mason*, as to adopting presumptions of fact from that law. It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe v. Nepean*, and to assert, as an exception to the rule, that the onus of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor, in *Re Green’s Settlement*, or with the dictum of Lord Justice *Rolt* when he said, in *Re Benham’s Trust*, that the question was one, not of presumption, but of proof; or with the real substance of the actual decisions, or the sound parts of the reasoning, in *Doe v. Nepean*, or with the judgments in *Rex v. The Inhabitants of Harborne*, and *Rex v. Lumley*, or with the principles to be deduced from the judgments in *Underwood v. Wing*. The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence. The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.” In *re Lewes’ Trusts*, L. R. 11 Eq. 236. Where one of the testator’s children had not been heard of for two years before testator’s decease, and was never heard of after, it was held to afford no evidence that he survived the testator, and the estate was settled upon the assumption that the child died before the testator. Walker in re, L. R. 7 Ch. App. 120. The presumption of life from absence unheard of is the counterpart of the presumption of death. *Hickman v. Upsall*, L. R. 20 Eq. 136.

⁵ Godolph. pt. 1, ch. 20, § 2; 1 Wms. Exrs. 287. In the State¹ of New York, it is held that an application for the probate of a will of personalty may be made by the executor or any one claiming an interest under the will. And where the executor institutes the proceedings, any such person may become a party thereto, at his election, or he may become a party to an appeal, although not a party in the Surrogate’s Court; and this should be done by petition for that purpose. *Foster v. Foster*, 7 Paige, 48. Surrogates’ courts are regarded as possessing the power, independent of the statute, to compel

* 5. If the executor has not the custody of the will, it is * 14 his duty to inquire for the proper custodian. And any one having the instrument in possession may be compelled by citation from the probate court, to come before it and surrender the same, or to give testimony of any knowledge he may have in regard to its existence or place of deposit.⁶ And where one is shown to have had the custody of a will, he is presumed still to retain it, and will be held responsible for the same unless he purge himself upon oath.⁷

* 6. And where a will is lost or mislaid, whether acci- * 15 dentally or by design, its contents may be proved, and probate granted of the same upon such evidence as is satisfactory to the court. The circumstances are almost infinitely various under which such questions are liable to come before courts of probate.

the attendance of witnesses, the production of wills, or other writings connected therewith, or with the proceedings of the court, and to commit parties for contempt in disobeying such orders. *Brick's Estate*, 15 *Abbott's Pr.* 12. But where the testator left two wills, both of which were presented for probate in the place of his domicile, and one of them allowed and the other rejected, and the executor afterwards applied to the probate court in another state for probate of the same will there, it was held the latter court had no power to compel him to produce the rejected will, that remaining on file in the former jurisdiction. *Loring v. Oakey*, 98 *Mass.* 267.

⁶ *Bethun v. Dinmure*, 1 *Cas. temp. Lee*, 158; *Swinb.* pt. 6, ch. 12, pl. 2; 1 *Wms. Exrs.* 288. An attorney or solicitor, with whom a will is deposited, cannot refuse to surrender it for probate, on the ground that the balance of his account against the testator is not paid, although it may include a charge for drawing the will. *Balch v. Symes*, *Turn. & Russ.* 87. See also *Law, ex parte*, 2 *Ad. & Ell.* 45.

⁷ *Ibid.* The preceding matters are all provided for in the statutory provisions of many of the states. *Purd. Dig.* 187, ed. 1853; 1 *Wms. Exrs.* 288 & *Am. n.* But where no special statutory provisions exist upon the subject, all these proceedings may be taken by the courts of probate, sua sponte, or upon the suggestion of any person interested, and under those implied powers which attach to all tribunals, whereby they are vested, ex necessitate, with authority adequate to the accomplishment of all their ordinary functions. In Louisiana, there seems to exist a provision for preliminary proceedings, in regard to the administration of estates, which are not conclusive upon the fact of the existence of a will, unless that question is put in issue and determined. But if, at the time of granting administration, the question of the existence of the will is directly put in issue, the party alleging its existence must produce evidence in support of that allegation. *McDonough's Succession*, 18 *La. Ann.* 419. The requisite proof to establish an holograph will, in this state, is here defined.

It will be the duty of such courts to receive the best attainable evidence of the existence and deposit of the will of any testator, deceased, and to establish the same, by probate in due form, whenever all reasonable questions of the existence and continuing force of the same, until the time of such decease, is adduced. The cases are too numerous, where questions of this character have been discussed, to be here specifically referred to. Many of them will be found in a former part of this work.⁸ It has been held that where a will was gnawed to pieces by rats, in the place of its deposit,⁹ that probate may be granted upon such proof as is afforded by the memory of witnesses and the remaining fragments. So also where a will is cancelled by the testator while not of sound mind.¹⁰ And equally where the testator was induced to destroy his will by undue influence. (a) But it must in all such cases be shown that an exhaustive search has been made for such missing will, in all places where there is the remotest probability that it would be found, before any secondary evidence can be received of its contents.¹¹ And in a very late English case, (b) where the

⁸ Ante, Vol. I. 348-350, 361, & n.

⁹ 1 Jarman, Perk. ed. 231.

¹⁰ *Rhodes v. Vinson*, 9 Gill, 169; 1 Add. 74; *Apperson v. Cottrell*, 3 Porter, 51.

(a) *Baton v. Watson*, 13 Ga. 63.

¹¹ *Jackson v. Hasbrouck*, 12 Johns. 192; *Fetherly v. Waggoner*, 11 Wend. 599. It is scarcely requisite, after what we said in our work on Wills, to caution probate courts against admitting lost wills to probate, unless upon the most unquestionable evidence. There are so many motives which might induce the suppression of a will, with a view to benefit some one, either by adducing proof to enlarge or diminish a bequest, or else to show its entire revocation, in each of which contingencies some supposable interest may be so differently affected as to afford adequate motive for the suppression, that we must always feel more or less doubt how far the application is in all respects *bonâ fide*. In short, the possible motives for such an act are so infinitely diversified, that it will be always next to impossible to conjecture, and guard against, all possible liability to fraud and imposition. It will thus be always less satisfactory to admit a lost will to probate than if the instrument itself had been produced; and it is safe to act upon that degree of incredulity, in all such matters, which will be sure to expose any suppression of it from sinister designs. Ante, n. 8. A copy of an alleged lost will is obviously far more satisfactory than any amount of testimony dependent upon the memory

(b) In the Goods of Mary Thomas, 20 W. R. 149, before probate court, Lord Penzance, J., Nov., 1871.

deceased died in 1835, leaving her will in the custody of her solicitor, and in 1871 it was sought for in the depositories of the

of witnesses, but a copy is not indispensable. *Jackson v. Lucett*, 2 Caines, Rep. 363; *Jackson v. Russell*, 4 Wend. 543; *Smith v. Steele*, 1 Har. & McHen. 419; *Hall v. Sittings*, 2 Har. & Johns. 112; *Happy's Will*, 4 Bibb, 553. But although the testimony of one witness, or of a copy verified by one witness, may be sufficient to establish the contents of a lost will, it is unquestionably requisite that the due execution of the instrument should be proved, as in ordinary cases. *Bailey v. Stiles*, 1 Green, Ch. 220, 231. And where the testator made a subsequent will, revoking a former one, and they were both lost, the former will cannot be allowed to stand upon proof of its contents, even where the proof fails to show the contents of the later one. The courts of probate in Ireland require an affidavit, setting forth the lost will in *hæc verba*, in order to grant probate. *Coghlan in re*, 4 Law Times, N. S. 839. Copies of a will kept by the testator (leaving the original with his solicitor, which was lost), were admitted to probate. *Pechell in re*, 6 Jur. N. S. 406.

The question of granting probate of lost wills continues still to occupy the attention of the English Court of Probate. The court granted probate of the draft of a lost will, being satisfied the original will was in existence after the death of the testator. *Podmore v. Whatton*, 33 Law J. N. S. Prob. 143. But in later cases, it has been held, where probate of the substance of a will contained in the parol evidence of witnesses was asked for, that the court could never act but upon the fullest, most stringent proof. *Wharram v. Wharram*, 3 S. & Tr. 301; *Eckersley v. Platt*, L. R. 1 P. & D. 281. And in this last case it was held, that after the lapse of six or seven years from the death of the testator, where the will was offered for probate, as contained in the testimony of the widow, solely interested under it, her niece and another connected by marriage with the widow, and who had had the custody of the original will, but could not produce it, the court would not decree probate, and it was said, if it had felt otherwise inclined, it would first have required argument upon the legality of giving effect to a will proved by parol evidence under the English statutes, 7 Will. 4 & 1 Vic. ch. 26. See also *Barber in re*, Law Rep. 1 P. & D. 267; *Johnson v. Lyford*, id. 546. In the latter case, the declarations of the testator, made about the time of the execution of the will, that a certain envelope contained a copy of it, and a letter, written by the testator soon after the execution, to the person named as executor, that he had executed his will and named him executor, were received as evidence in the probate, it being shown that the testator had executed the will, and that it could not be found. As to the effect of a writing merely revoking a former will, see *Hicks in re*, id. 683.

And where the person, who asks for the probate, has himself destroyed the instrument, after the death of the testator, although a copy is produced, the court will require the most satisfactory evidence of all the facts necessary to be established. *Moore v. Whitehouse*, 11 L. T. N. S. 458.

A will destroyed by the heir-at-law was admitted to probate on proof of the contents by one witness, and the production of a rough draft, the proof

solicitor, then dead, and not found, except in the form of a draft-will, a copy from which the will is commonly engrossed; but, on

of the execution being full. *Kearns v. Kearns*, 4 Harring. 83. The result of all the American cases upon this point seems to be, that although the courts of probate maintain the general doctrine already stated, that a lost will may be established by the same kind of proof as other lost instruments: 1, by copy; 2, by proof of contents, from memory and recollection; yet, in practice, so much severity of scrutiny is exercised, that very few lost wills are established, unless there is reason to believe they were purposely suppressed. In all other cases, the mere fact of the will being lost makes a very clear presumptive case of revocation. Those propounding a lost will must, therefore, assume the burden of showing,—1. That the will was duly executed by the testator; and, 2, That it was in existence at the time of his death; or, 3, That it had been accidentally or fraudulently destroyed, without his consent or knowledge. *Bulkley v. Redmond*, 2 Bradf. Sur. Rep. 281; *Chisholm v. Ben*, 7 B. Mon. 408; *Graham v. O'Fallon*, 3 Mo. 507. If a will be mutilated, or partially or wholly destroyed by the testator, or by his direction, while not in a competent state of mind to make an effective revocation (*ante*, Vol. I. § 25, pl. 37, n. 64), it will have no operative effect upon the instrument, and probate will be granted, the same as if no such act had been done, so far as the contents of the instrument can be ascertained. *Rhodes v. Vinson*, 9 Gill, 169; *Apperson v. Cottrell*, 3 Port. 51.

In South Carolina, in a trial to set up a lost will, the declarations of the alleged testator that he had no will, or that he had destroyed his will, are competent evidence for the contestants. *Durant v. Ashmore*, 2 Rich. 184. And in this case the declarations of the plaintiff, that he did not believe the deceased left a will, are competent evidence against him.

The question of the requisite proof to establish a lost will is further discussed in *Watkins v. Watkins*, 13 Rich. 66, where it seems to be considered that the party asking the establishment of such a will must produce all the persons present at its execution, whether subscribing as witnesses or not, or else account for their absence, or in some satisfactory mode, as by the admission of the opposite party, show that the absent persons, if produced, would declare that they had no recollection in regard to the transaction.

In New York, the statute prescribes the requisite proof to establish a lost will. 2 Rev. Stat. 68, § 74. 1. That the loss must have occurred after the death of the testator, unless it happened fraudulently in his lifetime. 2. The contents must be clearly and distinctly established by two credible witnesses,—a copy or draft being regarded equal to one witness. These proofs are indispensable in all courts and for all purposes. *Harris v. Harris*, 36 Barb. 88, 574. These questions, before the statute, were cognizable in equity, where the devisees (but not the heirs, whose remedy at law was held adequate), might maintain a bill to set up a will, claimed to have been revoked, and for that purpose to set aside the revoking will. *Bowen v. Idley*, 6 Paige, 46. But this jurisdiction is here controlled by the statute.

In resisting the probate of a will, it is competent, upon general principles,

examination of the solicitor's books, there was found on his day-book a charge, in his own handwriting, for preparing the will and attending to attest the same, with acknowledgment that the same had been paid,—the court admitted the entry as proof of the execution, upon the authority of *Higham v. Ridgway*. (c)

* 7. It has been held, that where the will is purposely suppressed or destroyed by the executor, or those interested under it, that a legatee, who is able to adduce satisfactory evidence of his rights * under such will, may, in a court of * 17 equity, obtain relief against those interested in the estate and who have been guilty of such suppression or destruction, on the ground of fraud or spoliation and suppression.¹²

to introduce any proof which shows that the instrument propounded is not a valid subsisting will; and for that purpose to show that the same was revoked by a subsequent will, which was fraudulently destroyed, or destroyed by the testator when incompetent to perform a testamentary act. *Nelson v. McGiffert*, 3 Barb. Ch. 158. The presumption, where the will was last heard of in the custody of the testator and cannot be found after his death, that he destroyed it, *animo revocandi*, does not arise, where the testator had lost his testamentary capacity for a period before his decease. In such a case, the burden of showing the time of the destruction of the will, and that the testator at that time acted understandingly, rests upon the party setting up the revocation. *Sprigge v. Sprigge*, Law Rep. 1 P. & D. 608. When the will is lost, and the expense of a trial incurred in order to establish it, through the negligent conduct of the executor, he may be compelled to pay costs to the contestants, and be restricted himself to such costs as would have been necessary if the will had not been lost. *Burls v. Burls*, id. 472.

The presumption of revocation does not arise, unless the proof leaves ground of reasonable inference that the will was not in existence at the decease of the testator. Where the facts indicate that the will was in existence three weeks before the decease of the testator, and that he suffered no change in his purpose of dying testate, and that the person interested in producing intestacy first made examination of the testator's depositories of papers, after his decease, and such person making no appearance in the case, the court refused to presume that the will had been revoked, and granted probate of the draft. *Finch v. Finch*, L. R. 1 P. & D. 371. See the case of *Lord St. Leonard's Will*, Appendix II., ante, Vol. I., Will, L. R. 1 P. D. 154.

(c) 10 East, 109; s. c. 2 Smith, Lead. Cas. 183. The entries in the case of *Mary Thomas* were, "June 15, 1835. Taking instructions for making will, and advising, £0 6s. 8d.; June 16, Drawing same, and engrossing; June 17, Attending, &c.; June 18, Reading over and attesting ye execution: £0 13s. 4d. Paid June 18. I kept it."

¹² Lord *Hardwicke*, in *Tucker v. Phipps*, 3 Atk. 360. It is here said, "Where the will is destroyed or concealed by the executor, if the spoliation is proved plainly (though the general rule is to cite the executor into the eccle-

* 18 * 8. It seems to have been the settled practice of the English ecclesiastical courts to require all papers, referred to in the will in such a manner as to become important and essential portions of it, to be deposited in the registry of the court, the same as the will itself.¹³ But the court may, where any proper necessity exists therefor, order the will or any of the testamentary papers to be delivered out of the registry, to be used as evidence elsewhere, when necessary.¹⁴ But that will seldom be the case where the probate, as in most of the American states, is conclusive evidence of the will and its contents, both as to real and personal estate.

9. It is held in the English courts of equity, as we shall show more fully hereafter, that it is not competent for those courts to interfere with the probate of a will affecting only personal estate, the exclusive jurisdiction of that matter being in the ecclesiastical courts, and the same rule obtains in the American courts of equity.¹⁵ But it has sometimes been held, that where a particular legacy is obtained by fraud and imposition upon the testator, or under a promise of acting as trustee for the use of another, a bill in equity will lie to compel the legatee to stand as trustee for the next of kin or person beneficially entitled.¹⁶

siastical courts), the legatee may properly come here for a decree upon the head of *spoliation and suppression*.' The same rule is established in Vermont. *Mead v. Heirs of Langdon*, cited in 22 Vt. 50. See also *Buchanan v. Matlock*, 8 Humph. 390.

¹³ 1 Wms. Exrs. 289, 290, and notes.

¹⁴ *Ibid.* The latest order of this kind cited by Mr. Williams, is that of the will of Napoleon Bonaparte, with its codicils, which was delivered out of the registry (after notarial copies had been made), in order to be sent to the proper place of record in France. 1 Wms. Exrs. 290. See also *Gibbs in re*, 28 Law J. N. S. Prob. 90, which was where the executor resided abroad and had to be sworn to the requisite affidavit, verifying the will before commissioners appointed for the purpose, the original will went with the commission, and an exemplified copy was left in the registry.

¹⁵ *Allen v. Macpherson*, 1 Phill. C. C. 133, and cases cited; *Barnesly v. Powel*, 1 Vesey, Sen. 284. See also 5 Beav. 469; *Gaines v. Chew*, 2 How. U. S. 619; *Wild v. Hobson*, 2 Vesey & B. 105. A court of equity has no jurisdiction to decide that the probate of a will is erroneous. *Taylor v. Creagh*, 8 Ir. Ch. Rep. 281. The same rule applies in South Carolina. *Myers v. O'Hanlon*, 13 Rich. 196.

¹⁶ *Kennell v. Abbott*, 4 Vesey, 802; *Lord Lyndhurst*, in *Allen v. Macpherson*, 1 Phill. C. C. 133, 144, 145. So equity will set aside a probate fraudulently obtained. *Meadows v. Kingston*, Amb. 762; post, § 15, pl. 3, where the matter is more fully discussed.

* SECTION II.

* 19

JURISDICTION OF MATTERS AFFECTING THE SETTLEMENT OF ESTATES.

1. The primary probate jurisdiction is in the place of the domicile of deceased.
2. No one can justify interfering with the estate except by letters testamentary.
3. The executor can only do necessary acts, admitting no delay, before probate.
4. Letters testamentary relate to the time of the decease.
- n. 6. Executors de son tort; the nature and extent of their responsibility.
5. The authority of the executor or administrator is limited to state where granted.
6. There are some apparent exceptions to the rule.
 - (1.) Where perfect title has been acquired by the personal representative.
 - (2.) Where any other person has so acquired title.
7. With these, and similar exceptions, the authority is local.
8. Creditors and effects give jurisdiction for ancillary administration.
9. Such administration considered wholly independent.
10. Where no creditors beyond the principal administration, debtors everywhere may pay the personal representative there.
11. Where there are no remaining creditors, the ancillary administration may remit to the principal administration.
12. But so long as there remain creditors, they may insist upon a distribution there.
13. The ancillary administration strictly restricted to its own jurisdiction.
14. The principal administration may collect effects belonging to the estate in any jurisdiction where no creditors of the estate remain.
- n. 16. The effect of bona notabilia in England explained.
15. After payment of debts, funds should be remitted to principal administration.
16. The final distribution can be more conveniently made there.
17. Consideration of other points.
 - (1.) Citation of cases to show that there is no privity between the representatives of an estate in different states.
 - (2.) The jurisdiction of the national courts not excluded, but essentially modified, by state proceedings in settlement of estates.
 - (3.) Foreign creditors may recover judgment in national courts, but must present it to probate court before decree of distribution.
 - (4.) But where assets are sufficient to pay all debts, the United States courts will, in equity, direct the personal representative to pay a judgment in those courts, before making distribution to legatees and next of kin.
 - (4 a.) Probate cases not transferable to Federal courts.
 - (4 b.) Same subject further discussed in late case.
 - (5.) Discussion of the question of the necessity of universal heir having administration in foreign forum.
 - (6.) That is not necessary, where the heir claims in his own right.
 - (7.) Where the national courts assume to disregard the authority of the state courts, as to what the law of the state is, their decisions rest upon no sound principle.
18. A foreign probate may be used as evidence of title.
19. But to affect title to realty, it must possess the requisites of the law of that place, *lex rei sitæ*.

20. And the later and better practice is to record a copy of the foreign probate in all other jurisdictions where the testator had property, either real or personal.
- * 20 * 21. The English courts of equity restrain proceedings abroad in conflict with the home administration.
22. Right of succession governed by law, as it existed at decease.
23. General rules affecting the law of domicile.
- (1.) Every one must have some domicile, and can have but one, at the same time.
 - (2.) Definitions of the word in different countries, change.
 - (3.) Domicile implies residence and purpose of making it permanent.
 - (4.) Definition by Mr. Justice *Wayne*.
 - (5.) Domicile can only be transferred by act and intent concurring.
 - (6.) The rule of law on this subject in England.
 - (7.) Not affected by the motive inducing the change.
 - (8.) Effect of mental unsoundness upon change of domicile.
 - (9.) One may assume new domicile and still intend to return.
 - (10.) But if done to evade the law it will not avail.
 - (11.) Very long change of residence will not effect change of domicile, unless so intended.

§ 2. 1. THE jurisdiction of the probate of wills, and of every thing pertaining to the settlement of estates is, primarily, exclusive, in the probate court for the district in which the testator is domiciled at the time of his decease.¹ This general rule is of such universal acceptance in all the American states, as scarcely to require any authority in its confirmation. Of such unqualified extent is this rule, that a will cannot be used as evidence affecting the title of personalty in any court of common law or equity, until it has been proved and allowed in the probate court,² with the single exception of a bill in equity, against the heirs and executor for a fraudulent suppression of the will as before stated.³

¹ Godolph. pt. 1, c. 22, § 2; 2 Black. Comm. 508; 1 Wms. Exrs. 264. And all proceedings there will be governed by the law of that place, and not by calling in aid the law of the place where the testator executed his will. *Pechell v. Hilderly*, L. R. 1 P. & D. 673.

² *Rex v. Netherseal*, 4 T. R. 258, 260; 1 Wms. Exrs. 172; *Strong v. Perkins*, 3 N. H. 517, 518; *Kittredge v. Folsom*, 8 id. 98. And a will made and proved abroad, or in one of the American states, before it is used as evidence in any other state, must be there recorded. *Wilson v. Tappan*, 6 Ohio, 172; *Bailey v. Bailey*, 8 id. 239; *Ives v. Allyn*, 12 Vt. 589; *Campbell v. Sheldon*, 13 Pick. 8; *Campbell v. Wallace*, 10 Gray, 162. But where the filing of a copy of the probate of a foreign will is allowed in any state to have the same effect as the probate itself, the executor thereby acquires the full powers of a local executor, although his powers were less extensive in the place of probate. *Hood v. Lord Barrington*, Law Rep. 6 Eq. 218.

³ Ante, § 1, pl. 7. But it has been held that where those solely interested

2. The only ground upon which an executor can justify any intermeddling with the estate, or any act towards the settlement of the same, is by the production of letters testamentary, with the probate of the will, from the Probate Court having the proper jurisdiction of the same.⁴

3. By the English law an executor could do many, indeed most acts pertaining to his office, except maintaining and defending * suits, before proof of the will, or obtaining letters tes- * 21
tamentary.⁵ But as in the American states, an executor has no such legitimate authority under the will, before probate, we shall not enumerate these acts. It will be sufficient to state that these acts, under the American practice, are confined to two classes: 1. Those which are strictly necessary and indispensable, such as providing for the decent burial of the deceased. 2. Those which are requisite to preserve the property of the estate, and for the comfortable support of the family, until the will can be put in the way of probate.⁶

in an estate, as heirs or distributees, there being no subsisting debts, agree to divide the same without administration, they may lawfully do so. And the same rule applies where there is a will; those interested may divide the estate without proving the will. *Carter v. Owens*, 41 Ala. 217. And where bonâ fide and valid claims against an estate have been paid, in good faith, by one interested in the estate, thereby intending to settle the same without administration, such payments will be allowed against the estate. *Brearly v. Norris*, 23 Ark. 166. Administration is more especially rendered necessary to avoid the possible consequences of false claims. *Succession of Sutton*, 20 La. An. 150.

⁴ 1 Jarman, Perk. ed. 218; ante, n. 1. A person who has assumed, without authority, to administer an estate, and claims to have administered fully, will be estopped, when called upon to account, from denying his representative character and liability to account. *Damouth v. Klock*, 29 Mich. 290.

⁵ 1 Wms. Exrs. 256, 263, and cases cited.

⁶ And as a general thing, where the probate of the will is contested, a special administrator, *pendente lite*, as it is called, will be appointed, who will perform the necessary duties pertaining to the office of executor or administrator, until the controversy is determined. This will be controlled by the statutes of the different states.

Those persons who wrongfully intermeddle with the goods or effects of any deceased person are denominated executors in their own wrong, or *de son tort*; and questions affecting their responsibility occupy considerable space in the English books. The American courts have sometimes held such persons liable to an action at the suit of creditors of the estate. But there has always been manifested a marked disposition here to narrow the range of such responsibility, and virtually to expunge the term from the law. It is, in itself, a sub-

- * 22 * 4. All acts coming under either of the foregoing denominations, — and when there has been no improper delay, all

ject resting upon no just basis of correlative rights and responsibilities, but operates chiefly in the nature of a penalty, for intermeddling with the effects of deceased persons. We have devoted no space to the topic, in this work, because it is so nearly obsolete in the American courts, that it would seem unjust to the profession to tax them with the expense of what is only speculatively useful, when so much which is practically so has to be omitted.

The early American cases discuss the topic only in a theoretical point of light, finally coming to the conclusion, that if it were conceded that one may incur the responsibility of an executor in his own wrong, by an unauthorized interference with the goods of the deceased, the case in hand is not one of that character. Thus in *Bacon v. Parker*, 12 Conn. 212, *Church, J.*, says, "There are many acts of a stranger which will constitute him an executor de son tort, such as taking possession of the assets, and converting them to his own use, paying debts or legacies, commencing actions, releasing debts, &c., and indeed any acts done which belong to the office of an executor, and furnish evidence to creditors of his being such. And yet there are other acts equivocal in their character, and such as are ordinarily performed by an executor, which, when explained, as they may always be, will appear to be mere acts of kindness and charity, and such as will not subject a stranger to the actions of creditors; such as locking up and preserving the goods, ordering the funeral obsequies, making a schedule of assets, feeding the cattle, repairing the houses, &c. All these, and perhaps many other acts, may be necessary for the comfort of the family and the preservation of the estate, before a will can be found and proved, and before administration can with propriety be commenced." Citing *Harrison v. Rowley*, 4 Ves. 212, 216, and many other English authorities. And somewhat similar views seem to have been entertained in the courts of Massachusetts. *Parsons, Ch. J.*, in *Mitchel v. Lunt*, 4 Mass. 658. But it has always been held that all such acts are cured by subsequent letters of administration. *Shillaber v. Wyman*, 15 Mass. 322; *Andrew v. Gallison*, id. 325; *Emery v. Berry*, 8 Foster, 473. And it was also said, by *Wilde, J.*, in *Campbell v. Sheldon*, 13 Pick. 8, 24, that an executor de son tort cannot settle the estate, nor collect the debts due, nor make any valid disposition of the effects belonging to the estate. See also *Bennett v. Ives*, 30 Conn. 329; *Marcy v. Marcy*, 32 Conn. 308.

By the present statute in Massachusetts, an executor de son tort, who can only exist so long as there is no rightful administration of the estate (see cases before cited), "shall be liable to the rightful executor or administrator for the full value of the goods or effects of the deceased taken by him, and for all damages caused by his acts to the estate of the deceased; and he shall not be allowed to retain or deduct any part of the goods or effects, except for such funeral expenses or debts of the deceased, or other charges actually paid by him, as the rightful executor or administrator might have been compelled to pay." Gen. Stats. ch. 94, § 15.

This brief history of the law upon this subject, in two of the American

such acts, * doubtless, as have been done in good faith by * 23 the executor, before receiving his letters testamentary, — will

states, may safely be regarded as a fair indication of the tendency of the public mind in America, in all the states. There will be found an extensive note upon the subject, in Mr. Fish's edition of *Wms. Executors*, vol. i. p. 226. The result of all the American cases seems to be, that where there is a rightful administrator, or the interference with the effects of the deceased is under claim of right, or with the bonâ fide intention of preserving the goods belonging to the estate, there will be no ground to charge one as executor de son tort. *Morrill v. Morrill*, 1 Shep. 415; *Nesbit v. Taylor*, 1 Rice, 296; *O'Reilly v. Hendricks*, 2 Sm. & M. 388; *Hawkins v. Johnson*, 4 Blackf. 21; *Chandler v. Davidson*, 6 id. 367; *Foster v. Nowlin*, 4 Mo. 18; *Kirk v. Gregory*, L. R. 1 Ex. D. 55. A purchase of an executor de son tort confers no better title than that of the vendor. *Carpenter v. Going*, 20 Ala. 587. Executors de son tort can only be compelled to account with the rightful personal representative. *Muir v. The Trustees of the Orphan House*, 3 Barb. Ch. 477.

Any one assuming to dispose of the effects belonging to the estate of a person deceased may be held responsible to the rightful personal representative, in tort, or for a conversion of such goods, whether such representative receive his appointment before or after the conversion. *Manwell, Adm. v. Briggs*, 17 Vt. 176. And in many of the American states such unlawful intermeddler is subject to responsibility as an executor de son tort. *White v. Mann*, 13 Shepley, 361; *Scoville v. Post*, 3 Edw. Ch. 203; *Mitchell v. Kirk*, 3 Sneed, 319; *Emery v. Berry*, 8 Foster, 473. By statute in New Hampshire, executors in their own wrong are liable to the creditors of the estate, to double the value of the estate so intermeddled with. *Bellows v. Goodall*, 32 N. H. 97. In Texas no such responsibility is recognized. *Ansley v. Baker*, 14 Texas, 607; and in Mississippi he is only liable to the extent of goods in his hands. *Hill v. Henderson*, 13 Sm. & M. 688.

The courts in North Carolina, whose decisions have always been regarded as of the greatest weight, have recognized this form of responsibility more thoroughly than those of any other state perhaps. *Bailey v. Miller*, 5 Iredell, 444; *M'Morine v. Storey*, 4 Dev. & Batt. 189; *Sturdivant v. Davis*, 9 Iredell, 365.

It seems agreed, on all hands, that one cannot become executor de son tort, by intermeddling with the lands of the deceased, since this is only a wrong committed against the estate of the heir or devisee, as the case may be. *Mitchel v. Lunt*, 4 Mass. 568; *Nass v. Vanswearingen*, 7 S. & R. 196. And the fact that an executor de son tort does not collect the effects of the deceased, and pay the debts due from the estate, is no justification to the creditors to levy upon the real estate belonging to the estate, as the lands of the deceased are in no sense assets in the hands of an executor de son tort. *Mitchel v. Lunt*, supra, by *Parsons*, Ch. J.

The one who makes himself liable as executor in his own wrong may be declared against as the rightful executor, and may protect himself by proving that fact, and is never liable beyond the assets coming to his hands. *Rogers, J.*,

be held entirely valid, his title by the probate of the will and granting of letters testamentary, being made good, and having relation back to the time of the decease of the testator. This presumptive relation back, is of so conclusive a character, that even if the executor before obtaining letters should bring a suit in his own name, as executor, on behalf of the estate, or appear in court to defend a suit pending, at the decease of the testator, or brought against his estate, after his decease, it will be rendered valid from the beginning, by the subsequent probate and granting of letters testamentary. This intendment of the law, that administration was granted at the precise moment of the decease of the testator or intestate, is made indispensable to maintain the continuity of title between the deceased and his personal representative. It has, therefore, become an elementary principle in the law, that this presumption is one not liable to contradiction by proof.

5. It is often an important question how far the title of the executor or administrator extends into other states than that * 24 where * administration is primarily taken. As a general rule, in the American states, the authority of a personal representative is strictly limited to the state from which it is derived. This is in analogy to the practice in the ecclesiastical courts, where the Ordinary was held to have no authority beyond the

in *Stockton v. Wilson*, 3 Penn. 130; *Brown v. Leavitt*, 6 Foster, 493. This relation back of the appointment of one as executor or administrator, can only afford a shield as to those acts which come properly within the scope of the authority of a rightful executor or administrator. *Bellinger v. Ford*, 21 Barb. 311.

In two cases, *Rayner v. Khœhler*, L. R. 14 Eq. 262; *Coote v. Whittington*, 16 id. 534, it was held, that the creditors may maintain a bill in equity against an executor de son tort, for an account of the goods in his hands, there being no personal representative. *Cary v. Hills*, L. R. 15 Eq. 79, seems to take a different view. We should not expect such a bill to be maintained here. A more appropriate remedy would seem to be an action of tort in the name of the personal representative. See *Wilson v. Davis*, 37 Ind. 141; *Wilbourn v. Wilbourn*, 48 Miss. 38. And in some of the states the executor de son tort is required to settle his account in the Probate Court, the same as any other executor; and, in case of his decease, his personal representative must close the settlement, but he cannot himself be held responsible, as executor de son tort, for receiving the goods wrongfully held by his decedent. *Alfriend v. Daniel*, 48 Ga. 154. Under the statutes of some of the states, it has been held that an executor de son tort cannot exist. *Fox v. Van Norman*, 11 Kans. 214.

limits of his own diocese, and that consequently he could confer none.⁷

6. There are, however, some well-established exceptions to this rule, or perhaps, strictly speaking, extensions of it, which have the appearance of exceptions.

(1.) An executor or administrator, after perfecting his title to the personal property of the estate by due proof, and obtaining proper letters, may maintain an action in his own name, without describing himself as executor or administrator, for the recovery of damages for any injury done to any of the personal property of the estate, after the decease of the testator or intestate; such action being founded, not upon the title of the deceased, but upon that of his personal representative, as such.⁸ It follows, by

⁷ Story, Conflict of Laws, Redf. ed. §§ 529 a-529 k, where we have brought together some of the leading cases upon this point, and where it will appear that the several American states are to be regarded as strictly foreign to each other, as to the settlement of estates. This general principle is recognized in many of the early cases in the American courts. *Perkins v. Williams*, 2 Root, 462; *Goodwin v. Jones*, 3 Mass. 514; *Dixon v. Ramsay*, 3 Cranch, 319. And the later cases in the Federal courts will be found to maintain the same view. *Wood v. Gold*, 4 McLean, C. C. 577. And in *Armstrong v. Lear*, 12 Wheaton, 169, it is declared that no testamentary paper executed by one domiciled abroad can be made the foundation of a suit for a legacy in the courts of this country, until it has received probate in this country in the court having the proper jurisdiction. And the recent cases both in the federal and state courts are all to the same effect. See post, pl. 18 and notes; Vol. I. § 30 a, pl. 27, p. 412; *Sheldon v. Rice*, 30 Mich. 296. See also *Campbell v. Sheldon*, 13 Pick. 8, and cases there cited both by counsel and court.

In some of the states, by statute, all that is required to give full effect to foreign letters testamentary or of administration is to file them with the clerk of the court where they are to be used. *Naylor v. Moody*, 3 Blackf. 92.

See, also, upon the general question of the necessity of independent administrations in every state where there is property belonging to the estate and the independence of such administrations upon each other, *Clark v. Clement*, 33 N. H. 563; *Caldwell v. Harding*, 5 Blatchf. C. C. 501. An administrator in one state cannot, on going temporarily into another state, be compelled by bill in equity, to render an account for maladministration or waste, at the suit of the distributees. *Jackson v. Johnson*, 34 Ga. 511. See post, pl. 17; *Smith v. Guild*, 34 Me. 443.

⁸ *Adams v. Cheverel*, Cro. Jac. 113. The majority of the court here say, the executor "hath election to bring it either of his own possession or as executor." And there are many instances where a foreign administrator or executor has been allowed to dispose of personal estate out of the state, such as bank shares, without taking new letters of administration. *Hutchins v.*

* 25 consequence, * that, as the executor or administrator, by virtue of his office, becomes seised in his own right of all the personal effects of the decedent in possession, whether in his actual custody or not; if such effects shall be carried into and withheld from the executor or administrator in any other state, American or foreign, an action may be maintained unquestionably in the name of such executor or administrator, without taking letters of administration in such foreign state or country.

(2.) So, too, where the title to property in possession, and even in choses in action of a negotiable character, becomes perfected under the administration in one state or country, any action requisite to vindicate and enforce such title in any foreign state may be maintained without recourse to any local administration.⁹

7. But beyond these and similar exceptional cases, the power and authority of an executor or administrator is limited to the

State Bank, 12 Met. 421; *Trecothick v. Austin*, 4 Mason, 16; *Clark v. Blackington*, 110 Mass. 369. See *Doolittle v. Lewis*, 7 Johns. Ch. 45. It is here said that *it seems* a foreign administrator may receive payment of a mortgage in this state, or execute a power of sale contained in the deed of mortgage, but that even is, perhaps, questionable. But as to mere choses in action, unless paid voluntarily, it is clear that a personal representative abroad cannot enforce them without taking new letters; and, strictly speaking, it is rather an extension of the rule, by construction, to allow an executor or administrator in one state to collect the effects in another state and bring them within his own jurisdiction, and there administer upon them. But where there are no creditors in the foreign jurisdiction, the only effect of an administration there being to collect and remit the effects to the principal administration, this is allowed to be done by the principal administration, without any express authority within that jurisdiction, the irregularity being one of form merely. But where there is an ancillary administration in the state, a payment to the administration of the domicile will be of no avail. *Stone v. Scripture*, 4 Lans. (N. Y.) 186.

⁹ *Vanquelin v. Bouard*, 10 Jur. n. s. 566; s. c. 15 C. B. n. s. 341; *Bullock v. Rogers*, 16 Vt. 294. See also *Kilpatrick v. Bush*, 23 Miss. 199. And an administrator appointed in one state cannot maintain an action upon the statute of another state, where the injury to his intestate occurred, and where the statute of such other state gave the personal representative of one who suffered an injury resulting in death, where the party injured might have maintained an action therefor, a right of action to recover damages, for the benefit of the widow and next of kin. *Richardson v. N. Y. Central Railw.*, 98 Mass. 85. See also *Woodard v. Michigan Southern & Northern Ind. Railw.*, 10 Ohio, n. s. 121; *Needhan v. Grand Trunk Railw.*, 38 Vt. 294. A foreign executor may maintain an action on a judgment recovered by him in the state of his appointment. *Barton v. Higgins*, 41 Md. 539.

state or country where it is granted. He cannot maintain an action *in any other state or country where he declares * 26 upon the title of the decedent, nor can he show title to any personal property in possession which was not within the jurisdiction of the probate courts in the place of the domicile of the deceased at the time of such decease, or which has not been voluntarily carried there since that time from a foreign state in which the deceased owed no debts. For, in every state where there is personal or real estate and debts owing, a right attaches for a distinct administration, and this dates from the time of the decease.

8. Hence, where there is a principal administration in the place of the domicile of the decedent, and in other states there are creditors and estate, real or personal, belonging to the estate, there accrues a right to an auxiliary, or ancillary administration as it is called, since it is subsidiary, and, as it were, supplemental to the principal administration.

9. But these administrations are regarded as wholly independent of each other; so much so, that a judgment recovered against the personal representative of the estate in one state forms no ground of action against such representative in another state.¹⁰

10. But it must be conceded, that where there are no creditors beyond the limits of the principal administration, there is no reason why the debtors of the estate may not, by making payment to the personal representative in the place of the principal administration, obtain a valid release of the cause of action. And it is upon this ground, we apprehend, that it has been so often affirmed and decided, that although the authority of the personal representative is limited to the state where he is appointed, he may nevertheless collect the effects of the decedent in any other country, and give a valid release to all who may have there incurred any liability to the estate.¹¹

¹⁰ *Aspden v. Nixon*, 4 How. U. S. 467. This question has repeatedly arisen before the United States Supreme Court, and has finally settled down upon the rule stated in the text. *Stacy v. Thrasher*, 6 How. U. S. 44; *Hill v. Tucker*, 13 How. 458; *McLean v. Meek*, 18 How. 16.

In *Low v. Bartlett*, 8 Allen, 259, it was held that if ancillary administration has been taken in another state, a judgment rendered there, after the time for presenting claims in the principal administration had expired, could not be enforced against such principal administration by a proceeding against either the executor or the legatees, to compel them to refund.

¹¹ *Story, Conflict of Laws*, §§ 515, 515 a, citing *Stevens v. Gaylord*, 11

* 27 *11. It is upon this ground we apprehend, that, as held by *Nelson and Curtis, JJ.*, in *Mackey v. Coxe*,¹² in every case of an auxiliary administration, it depends upon the discretion of the Probate Court granting such administration, *after the satisfaction of all claims within that jurisdiction*, or where none such exist, whether the remaining assets should be there distributed by the administration within that jurisdiction, or remitted to the principal administration for distribution there; and until that question is determined the ancillary administrator is in no default.

12. It must follow from this proposition — and it is abundantly fortified by the decisions in the different American states¹³ —

Mass. 256. But see *Bullock v. Rogers*, 16 Vt. 294, 296, where it is said the case of *Stevens v. Gaylord* does not justify the inferences made from it by Mr. Justice *Story* and Chancellor *Kent*, that the principal administration can release debts in other jurisdictions, where there are ancillary administrations. See 2 Kent, Com. 432 and n.; post, pl. 14; ante, n. 8. The opinion of *Jackson, J.*, in *Stevens v. Gaylord*, is an elaborate exposition of the law affecting the administration of estates; but it holds clearly that the ancillary administration alone, in the first instance, has jurisdiction to collect all debts due within that district, even debts due from the ancillary administrator to the intestate; and the reason assigned is, that he may require them to pay the creditors in that jurisdiction. But if there are none there, or after they are all paid, the learned judge declares the balance of assets will be remitted to the principal administration for distribution. But if any debtor in that jurisdiction have already paid his debt to the principal administration, it will be a defence in equity surely, if not at law. See *Middlebrook v. Bank*, 3 Abb. App. Dec. 295; *Freeman's Appeal*, 68 Penn. St. 151, which seem to show that there is no very settled practice in the different states.

In the recent case of *Wilkins v. Ellett*, 9 Wallace, 740, the question of payment to the principal administration, by the debtors of the estate, while they resided in a foreign district and the payment being there made, was considered, and the court unanimously declare that such payment is entirely valid and a full defence against a subsequent action by an administrator appointed where the debtor resides and where the payment was made, there being no creditors or distributees residing in that district or state. This seems to us the only just and sensible rule upon the subject, and we are glad to have it promulgated by a court of such paramount authority.

¹² 18 How. U. S. 100. But the principal administration cannot compel the ancillary one to surrender the property under its control; it is merely optional, at most, whether to administer or surrender it. *Carmichael v. Ray*, 5 Iredell, Eq. 365.

¹³ *Heirs of Porter v. Heydock*, 6 Vt. 374. s. p. *Probate Court v. Kimball*, 42 Vt. 320. This subject is considerably discussed in *Dawes v. Head*, 3 Pick. 128, which was the case of an ancillary administration, and the intimation here is, that where the whole property is not sufficient to pay all the debts,

that so long as there are creditors within the jurisdiction of the ancillary administration, they will have a legal right to insist upon having all the assets within that jurisdiction there administered and distributed; and the residue in the hands of the ancillary administrator, whether he may be the same or a different person from the one holding the principal administration, may be remitted to the principal administration for distribution there, or the administrator in the ancillary administration may be ordered to pay over the amount to those persons who shall be found entitled to receive the same in the principal administration so as to enable them to take * the benefit of any security for * 28 faithful administration in the ancillary jurisdiction, as was done in *Heirs of Porter v. Heydock*.¹³ This question is elaborately discussed in *Jennison v. Hapgood*.¹⁴

13. While the principal administration, so far as all claims against the estate are concerned, unless it be creditors in the place of an ancillary administration, is entitled to receive and distribute the whole estate; and as it will make no difference as to all other claimants whether the distribution is in fact made in one place or another, since, wherever made, it must be made according to the law of the place of the domicile of the deceased, the ancillary administrator has no binding duty of administering beyond collecting and remitting to the principal administrator, except so far as to satisfy the claims of creditors within his own jurisdiction.

the creditors in the ancillary administration should only be paid their ratable proportion, taking the property and debts in both jurisdictions into account, and that the balance be remitted to the principal administration, to be there distributed to creditors there, in order to make them equal with the other creditors. But this rule has not been followed in more recent cases.

¹⁴ 10 Pick. 77. This subject is considerably discussed in *Churchill v. Boyden*, 17 Vt. 319. And the opinion here expressed is, that only resident creditors will be considered in an ancillary administration, and that such creditors will be paid in full, where the estate upon the whole is clearly sufficient for that purpose, and the balance remitted to the principal administration for distribution among the legatees or next of kin. It is, however, held, that this last is only by courtesy, and that a final distribution may be made in the place of the subsidiary administration, if for any reason it is deemed expedient. And it is also said, that in cases where the entire funds of the estate are insufficient to pay creditors in full, it is more common to make only a pro rata payment to the local creditors. This rule seems to be favored, in addition to cases elsewhere referred to, by the following: *Davis v. Estey*, 8 Pick. 475; *Miller's Estate*, 3 Rawle, 312; *Olivier v. Townes*, 14 Martin, 93.

Hence a very strict construction has been adopted as to the extent of the claims of an ancillary administrator in regard to the effects of the deceased. As where the ancillary administrator brought suit against a person who was indebted to, or had in his possession, money belonging to the estate, but who did not reside within the jurisdiction of the ancillary administration, it was held no recovery could be had, as such debt or money did not constitute assets within the jurisdiction, and that it made no difference that no other administration upon the estate had been taken, and that there were creditors within the ancillary jurisdiction unsatisfied.¹⁵ The ancillary administration cannot be allowed to draw into its jurisdiction any assets not locally situated within its limits.

14. It is upon this ground that some of the discrepancies, or apparent discrepancies, in the American cases, as to the * 29 right of * the principal administrator to receive payment of a debt due the estate, where the debtor resides out of the jurisdiction, provided there are no unsatisfied creditors within that jurisdiction, may be reconciled. But so long as such creditors remain unsatisfied, a payment of debts in that jurisdiction to the principal administrator will afford no defence against a suit by an ancillary administrator appointed in that jurisdiction.¹⁶

15. There are some intimations in the American decisions, as before stated, that where the assets in the ancillary administration are

¹⁵ *Abbott, Admr. v. Coburn*, 28 Vt. 663.

¹⁶ *Vaughn v. Barret*, 5 Vt. 333; *Shaw*, Ch. J., in *Rand v. Hubbard*, 4 Met. 252. It is here held that debts due the estate in any state constitute a ground of probate jurisdiction in the place of the residence of the debtor, according to the rule of the English law that such debts constitute bona notabilia in the place of the residence of the debtor. *Hilliard v. Cox*, 1 Ld. Ray. 562. We have said nothing in our text in regard to the question of bona notabilia, which occupies considerable space in the English books on the settlement of estates, because it has no application to questions arising in the American states, except incidentally. It will be found sufficiently defined in 2 Black. Comm. 509. Where any person at the time of his decease had chattels, either in possession or action, in more than one diocese, of the value of £5 or more, it gave the archbishop or metropolitan of the province jurisdiction of the administration, which could therefore only be taken in the prerogative court of such province. Unfortunately, in the economy of the American governments, there is no provision for embracing different states in a prerogative administration, which would tend very much to simplify and render uniform the proceedings in the settlement of estates situated partly within the limits of different states.

more than sufficient to pay the debts there, and all the property belonging to the estate is less than the debts, so that there will be a deficiency in the principal administration for payment of debts, that full payment is not to be made to the creditors in the ancillary administration.¹⁷ But unless there is some special statute to that effect,¹⁸ we do not well comprehend, upon general principles, how this blending of the two administrations can be effected. As no creditor out of the jurisdiction of the ancillary administration, can present his claim before the commission of the ancillary administration, the personal representative can, strictly speaking, know nothing of any other creditor, and he has nothing to do with the general settlement of the estate. All claimants, except local creditors, should more properly, be referred to the principal administration.¹⁹

¹⁷ *Dawes v. Head*, 3 Pick. 128; *Davis v. Estey*, 8 id. 475.

¹⁸ Mass. Gen. Stat. c. 100, §§ 40, 42; 3 Met. 114.

¹⁹ *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Boylston*, 9 Mass. 337. It has been decided that an executor or administrator is not liable to be called to account in any foreign jurisdiction for any alleged default in his fiduciary capacity; but if he carry the property of the decedent into any foreign jurisdiction, where there is a principal or ancillary administration, he may then be held responsible to surrender or account for the property. *Beeler v. Dunn*, 3 Head, 87. This case seems to follow the rule laid down by the learned Chancellor, in *McNamara v. Dwyer*, 7 Paige, 239. But that case is placed mainly upon the argument, that unless some such rule could be maintained, there might occur a failure of justice, which, like most other arguments *ab inconvenienti*, is not of the most conclusive character. It seems to us, that unless there is proof of fraud or attempted fraud, in carrying the effects abroad, where the executor or administrator cannot be reached, by the tribunals of the appropriate jurisdiction, there is no necessity, and consequently no propriety, in compelling a trustee or other person standing in a fiduciary relation, to account for his conduct, in that relation, in a foreign court. And Chancellor *Walworth's* declaration, that it could only be required in conformity with the law of the place where the trust was created, is not entirely satisfactory. For one of the securities in undertaking such fiduciary trusts or offices is, that the appointee shall only be required to satisfy the demands of the very tribunal conferring the power, and which may best be supposed to understand the local law and the duty imposed by it. It was accordingly held, in *Morrill v. Morrill*, 1 Allen, 132, that an executor is not chargeable in Massachusetts for money received for rents and profits of real estate situated in New Hampshire. But it was said by Chief Justice *Bigelow*, in *Chase v. Chase*, 2 Allen, 101, 104, that where the trust fund arose from a will proved in this state and where the testator and the executor or trustee were both domiciled here, the fact that the income was directed to be paid to the son of the testator "for

* 30 * 16. The final distribution among all the claimants of an estate can more conveniently and, unless for special reasons it is otherwise ordered by an ancillary administration, should be made in the place of the principal administration.²⁰ We
 * 31 shall have occasion to * pursue this topic more in detail under the head of Settling Accounts and Marshalling Assets.

17. It may not be out of place to repeat here some portion of our discussion of this and analogous topics, in the late edition of Mr. Justice *Story's Conflict of Laws*.²¹

(1.) There is a very elaborate note of the American cases upon this general subject in the later editions of Kent's Commentaries,²² in which it is very clearly shown, that the law of this country recognizes no privity between the different administrations in different states, but that each is sovereign within its own limits, and none have any authority beyond that extent. To this point may be cited numerous leading cases from different states, where the subject is extensively discussed.²³

the support of himself and his family and the education of his children," and that the son resided without the state, will not defeat the jurisdiction of the courts of this state over the administration of the fund after the income came into the hands of the son; that the court, if necessary, will "upon satisfactory proof that the income is misapplied by the sub-trustee, to whom by the will he is directed to pay it . . . enjoin the trustee, who is within the jurisdiction, from making further payments, and pass such decrees in relation to the future disposition of the income as the rights of the cestuis que trustent may in equity require." It is the duty of every personal representative to distribute that portion of the estate in his hands among those entitled, pro rata, without regard to the estate in other jurisdictions. *Mordecai v. Boylan*, 6 Jones, Eq. 365.

²⁰ *Fay v. Haven*, 3 Met. 109; *Wheelock v. Pierce*, 6 Cush. 288. It is here held, that although the principal administrator have assets sufficient to pay all debts and take ancillary administration where there are creditors, he is not bound to pay these latter creditors beyond the amount received within that jurisdiction. They must resort to the principal administration, where the assets were received and are to be administered. The final distribution of the assets of an estate, among legatees and distributees, must always be made in conformity with the law of the place of the domicile of the decedent, at the time of his decease. *Holmes v. Remsen*, 4 Johns. Ch. 460.

²¹ *Story*, Conf. Laws, Redfield's ed. §§ 529 a-529 m.

²² Vol. 2, pp. 434, 435.

²³ *Goodall v. Marshall*, 11 N. H. 88; *Dawes v. Boylston*, 9 Mass. 337; *Stevens v. Gaylord*, 11 id. 256; *Porter v. Heydock*, 6 Vt. 374; *Bullock v. Rogers*, 16 Vt. 294; *Abbot v. Coburn*, 28 Vt. 663; *Fay v. Haven*, 3 Met. 109; *Gravillon v. Richard's Exr.*, 13 La. 293; *Mothland v. Wireman*, 3 Penn. 185.

(2.) The subject of remedies, in regard to the distribution of the estates of deceased persons, in the national tribunals, where the parties in interest reside in different states, has been considerably discussed in the Supreme Court of the United States. It is there settled that a creditor cannot have an execution in a court of the United States, so as to levy upon the property of an estate represented as insolvent, and which is in the course of settlement as such.²⁴ Whether it is competent for state authority to compel foreign creditors, in all cases, to seek their remedies in the state * courts against the estates of decedents, to the exclu- * 32 sion of the jurisdiction of the United States courts, seems not to have been fully determined.²⁵ But upon principle it would not seem competent for the several states to exclude the jurisdiction of the national tribunals in matters of this kind, any more than in common-law actions. But the mode of enforcing remedies in the United States courts will undoubtedly be attended with some embarrassments. And where the state laws provide that suits pending at the decease of a debtor, whose estate is represented insolvent, shall be discontinued and brought before the commissioners of insolvency, we do not see but this, if binding at all, must extend to the national courts, the same as a statutory bar.

(3.) It would seem to be the established rule, however, in the national tribunals, to allow a foreign creditor to pursue his claim to judgment there, without regard to state laws, conferring exclusive jurisdiction in the settlement of estates upon particular state courts or commissioners. But such judgments must be brought into the Probate Court before any distribution is there decreed, or else it would seem impracticable to entitle them to an equal share

It was held, in an early case in Vermont, *Hunt v. Fay*, 7 Vt. 170, that where the principal administration was in one state, and a creditor having his domicile there, failed to present his claim before the commissioners, by which he was barred from any recovery of the same in that state, that having removed into another state, where there was an ancillary administration, he could not present it there, his neglect to present it in the first instance having extinguished his debt. But according to present views, the debt was only barred as a claim upon the estate so long as he remained within that jurisdiction.

²⁴ *Williams v. Benedict*, 8 How. 107; *Peale v. Phipps*, 14 id. 368; *Bank of Tennessee v. Horn*, 17 How. 157. And if the creditor sell land of the estate on such execution, the sale is void. *Yonley v. Lavender*, 21 Wall. 276.

²⁵ *Green's Admx. v. Creighton*, 23 How. 90, 107.

in the distribution, where the assets proved insufficient to pay all the creditors.

(4.) But in a case where all the creditors had been paid, and the administrators still held assets in their hands, the creditor, having recovered judgment in the courts of the United States, was held entitled to maintain a bill in equity in those courts to enforce the payment of his judgment before any distribution to the heirs, notwithstanding such judgment had not been presented before the commissioners of insolvency appointed to audit all the claims against the estate, and the provision in the state statutes that all claims not presented to such commissioners should be forever barred after a certain time, which in this case had already expired.²⁶

(4 a.) It has been decided by the state courts, whose decisions are subject to control by the national courts upon the point, that it is not competent for a party interested in the probate of a will pending in the Probate Court, and who is a citizen of another state, to remove the case into the Federal courts under the acts of Congress regulating that subject. (a) And when the administrator has brought a bill in equity to marshal the assets in his hands and settle conflicting claims of the parties by way of interpleader, it is not competent for one claimant who is a citizen of another state to transfer the suit into the Federal courts. (b)

(4 b.) And in a very late case (c) the Supreme Court of the United States discuss this question very much at length, confirming the general views already stated, and holding that it is not competent for the Federal courts to interfere with the jurisdiction of the probate courts, in the several states, in the settlement and distribu-

²⁶ *The Union Bank of Tennessee v. Jolly's Admr.*, 18 How. 503; *Green's Admx. v. Creighton*, 23 How. 90. And it is competent for the Circuit Court of the United States to sustain a bill in equity in favor of a distributee against an administrator even where by the provisions of the statutes in the state no suit at all could be sustained by a state court. And it will not be indispensable in such cases to join other distributees, where the court can do justice between the particular parties without joining others. And there is no objection to joining the sureties of the administrator where the burden of any judgment recovered may fall on them. *Payne v. Hook*, 7 Wal. U. S. 425.

(a) *Hargroves v. Redd*, 43 Ga. 142.

(b) *Burts v. Loyd*, 45 Ga. 104.

(c) *Yonley v. Lavender*, 7 Chicago L. N. 154; 21 Wall. 216.

tion of the estates of deceased persons, so long as they pursue, with reasonable regard to the provisions of the national constitution, the course of duty prescribed by state laws, making no injurious discriminations between the claims of resident and non-resident citizens. In case of such discrimination, even when justified by state statutes, or of unreasonable delay, it might be competent for non-resident citizens to seek redress, by way of petitions in equity, in the national courts, and these courts will apply the appropriate remedy. But in a later case, (*d*) it was held, that no proceeding in equity could be maintained in the Federal courts, to revise the proceedings in a probate court for the proof of a will, and its allowance, as duly proved, with no appeal, such decree being final against all the world, without reference to any disabilities of the plaintiffs.

* (5.) The question of the right of those claiming title * 33 through deceased parties to maintain an action in a foreign forum to enforce those rights, without having taken letters of administration there, was extensively discussed, in a recent case, before the Court of Common Pleas, where it was held, that the widow of a French subject, who became donee of the universality of the real and personal estates of the succession of her husband, and in whom, as such, all his rights by the law of France vested, and who was entitled to enforce the same in her own name, and who also became responsible for all her husband's liabilities, and who was compelled to pay the amount of certain bills of exchange, of which her husband was drawer and the defendant acceptor, and who had recovered judgment thereon in France against the defendant; was not bound to take out letters of administration in England in order to entitle her to maintain an action upon such judgment.²⁷

(6.) The last case seems to go upon the ground that the plaintiff claimed in her own right, and not in the right of the deceased. This might have been placed upon the mere ground of judgment recovered in the name of the plaintiff. But the court placed the case mainly upon the ground that the plaintiff, by paying the debts of her husband, had become the owner, in her own right, of all the effects belonging to his estate, and might enforce those

(*d*) *Risley v. McGlynn*, *Forum Law Review*, April, 1875, p. 321.

²⁷ *Vanquelin v. Bouard*, 10 *Jur. N. s.* 566; *s. c.* 15 *C. B. N. s.* 341.

rights in her own name. This may be true of personal estate in possession of a foreign executor, and which is afterwards converted in a foreign state,²⁸ but is more questionable in regard to choses in action, which can only be sued by some personal representative of the deceased, appointed by the probate courts in the forum where the action is brought.²⁹

(7.) A question has arisen in regard to the comparative authority of the state and national tribunals, in declaring the law of a particular state or district, in which those courts hold concurrent jurisdiction.³⁰ And in a matter of general jurisprudence, where the national court of last resort had presumed to disregard the authority of the state courts,³¹ in such cases,³² and had virtually overruled the decision of the state court, after the principle had been acquiesced in for more than thirty years, and the very case for nearly twenty years, and when it was only collaterally before them, the decision in the national court was dissented from by three judges, and was so manifestly a departure from its usual course, and so much a usurpation of authority over the state courts, that it was not, and could not, be followed by the state courts without a virtual surrender of their independent action. While it is probable enough that the decision of the national court may be just and equitable as to the private rights involved in the particular case, it seems quite certain that the principle involved, or claimed to be involved, of disregarding the authority of the court of last resort in the state, as to what the law of the state is, cannot fairly be maintained.

18. In the first part of this work³³ the effect of foreign probates, and the mode of making them effective in the domestic jurisdiction, is considered. It is not regarded as essential to the proof of a foreign will in the courts of another place than the domicile of the testator, that the foreign probate should be there recorded in the probate courts. But in order to be used, as evidence in a foreign jurisdiction, it must be shown that the will has been duly

²⁸ *Bullock v. Rogers*, 16 Vt. 294.

²⁹ *Whyte v. Rose*, 3 Q. B. 493.

³⁰ *Towle v. Forney*, 14 N. Y. 423.

³¹ *Clarke v. Vansurley*, 15 Wendell, 436; s. c. nom. *Cochran v. Van Sur- lay*, 20 Wendell, 365; s. p. *Matter of Bostwick*, 4 Johns. Ch. 100.

³² *Williamson v. Berry*, 8 How. U. S. 495.

³³ Vol. I. p. 400, § 30 a, pl. 11, 27.

admitted to probate in the tribunal of the place of domicile, having the proper jurisdiction to make proof of wills.³⁴

19. And when a will, devising real estate in states foreign to that of the domicile of the testator, has been duly proved in the latter jurisdiction, it was held in the early American cases, that it might be used, as evidence of the title thus acquired in any jurisdiction where that question might arise.³⁵ And the same doctrine has been often subsequently maintained.³⁶ But as a will, in order to affect the title of land must be executed in conformity with the *lex rei sitæ*, it has been held that the proof must be also made by the same number of witnesses requisite to the validity of the will in that place, in order to have any effect upon the title to land there situated.³⁷

* 20. But the practice now is to file, in the proper probate * 35 court of the place where real estate is situated, copies of the original probate of all testamentary papers in any way affecting its title or transmission, and which were executed by persons domiciled abroad, or in any other state, and have been there duly proved, which has the effect of an original probate, by the statutes of most of the American states.³⁸ And the English courts of equity seem to entertain the same views, as to the necessity of probate in the home jurisdiction, in order to give a foreign will any operation upon personalty even,³⁹ and *à fortiori* upon realty.

21. There is an English case,⁴⁰ where a testator, domiciled in

³⁴ *Jemison v. Smith*, 37 Alabama, 185; *Townsend v. Moore*, 8 Jones, Law, 147.

³⁵ *Doe v. M'Farland*, 9 Cranch, 151.

³⁶ *Slack v. Walcott*, 3 Mason, 508. But in this case the question of the title to land came only incidentally in question.

³⁷ *Hylton v. Brown*, 1 Wash. C. C. 204, 298, 343. And in Maryland, in *Budd v. Brooke*, 3 Gill, 198, it was decided, at a comparatively early day, that an exemplified copy of the probate of a will made in any other state was not evidence to establish a devise of land in that state, and that only the courts of that state could make proof of wills devising real property there.

³⁸ Ante, Vol. I. § 30 a, pl. 11, p. 400; *Campbell v. Sheldon*, 13 Pick. 8. And where real estate is disposed of under such a proceeding, the title of the purchaser will be upheld, even where the original probate is secured by consent of the parties interested in such proceedings in the place of domicile. *Foulke v. Zimmerman*, 14 Wall. 113. See also *Bromley v. Miller*, 2 Th. & Cook (N. Y. Sup. Ct.), 575.

³⁹ *Price v. Dewhurst*, 4 My. & Cr. 76, 84; *Bond v. Graham*, 1 Hare, 482.

⁴⁰ *Hope v. Carnegie*, Law Rep. 1 Eq. 126.

England, and having real and personal estate both in England and Holland, and had given, by will, all his property to trustees resident in both countries, and a decree had been made in England for the administration of the estate and a child of the testator afterwards took proceedings in Holland for the administration of the real and personal estate there, it not appearing that these proceedings could be carried on against the real estate alone, that the English courts of equity restrained these proceedings.

22. It seems entirely well settled in the English law, and the same rule obtains generally in this country, that the rights of succession to personal property will be governed by the law of the place where the decedent had his domicile at his decease, and by that law as it then existed. Any decree of forfeiture of estate therefor, which the government of that country may make after the decease, will not affect the proceedings in the Probate Court.⁴¹

23. Our purpose in this work will not, naturally, embrace the general law of domicile; nor should we feel at liberty to enter upon its general consideration here. But a brief intimation of the existing law upon the point cannot fail to be of interest to many of our readers, as it is, to some extent, involved in the settlement of estates.

(1.) It is recognized as an elementary principle in the law of domicile, that every person must always have some domicile, and that he can never have more than one domicile, at the same time, for general purposes.⁴²

(2.) The word "domicile" is a term of comparatively recent adoption into the English law. It is not even found in the early English dictionaries,⁴³ nor in most of the law digests and abridgments. The term comes from the Roman civil law,⁴⁴ where it is nearly synonymous with our word "home," or the Latin *domicilium*; ⁴⁵ which if one leaves he becomes *peregrinus*, a wanderer, or one absent from home; and as to his home, he was called *incola*, a cultivator, or dweller in a town, city, or its environs. The Code Napoleon ⁴⁶ defines the domicile of a Frenchman as "that place where he has his principal establishment;" and it adds,

⁴¹ *Lynch v. Paraguay*, L. R. 2 P. & D. 268.

⁴² *Abington v. North Bridgewater*, 23 Pick. 170, 177, where *Shaw*, C. J., discusses the subject very extensively.

⁴³ Johnson, London, 1792.

⁴⁴ Cod. Lib. 10, tit. 39, l. 7.

⁴⁵ Dig. Lib. 50, tit. 1, l. 27.

⁴⁶ P. 31, number 102, 103.

that a "change of domicile shall be effected by the circumstance of a real habitation in another place, accompanied with an intention of fixing a principal establishment in such other place."

(3.) The change of domicile can only be effected by an actual change of residence, with the present purpose of making it permanent, or at least with intent to abandon the former domicile, permanently, and to retain the newly adopted one until some new change of purpose in that respect. Two things must therefore concur to constitute domicile: First, residence; secondly, the intention of making it the home of the party. There must be the fact and the intent, *animo et facto*.⁴⁷

(4.) It is most undisputed law, that no one can acquire a new domicile until he has put off the former one. A man's primary domicile is acquired by birth, or the act of those upon whom he is then dependent. This is commonly called the domicile of origin. All subsequently acquired domiciles, after coming of full age, or *sui juris*, are called domiciles of choice, which are thus defined by an eminent jurist and judge, Mr. Justice *Wayne*:⁴⁸ "There must be, to constitute it, actual residence in the place, with the intention that it is to be the principal and permanent residence. That intention may be inferred from the circumstances or condition in which the person may be, as to the domicile of his origin, as from the seat of his fortune, his family, and pursuits in life." And the learned judge adds, that a change of domicile is not inferred where the removal is for "some particular purpose expected to be only of a temporary nature."

(5.) The cases are full to the point, that one cannot transfer his domicile by the mere purpose or intention to do so. The language of Mr. Justice *Wilde* is full to this point:⁴⁹ "Whatever might have been the testator's intentions, there is no satisfactory evidence to show that a new domicile was acquired. He had no establishment in Vermont," the alleged place of new domicile. And the language of *Bigelow, J.*, in *Holmes v. Greene*:⁵⁰ "But no case can be found, where the domicile of a party has been made to depend on a bald intent, unaided by other proof. The factum

⁴⁷ Story, Conflict Laws, § 44; 8 Petersd. Ab. 463, in n.; *Bangs v. Brewster*, 111 Mass. 382.

⁴⁸ *Ennis v. Smith*, 14 How. U. S. 400, 423.

⁴⁹ *Jennison v. Hapgood*, 10 Pick. 97.

⁵⁰ 7 Gray, 299, 301.

and the animus must concur in order to establish a domicile.⁵¹ The latter may be inferred from proof of the former. But evidence of a mere intent cannot establish the fact of domicile." And the same rule was declared in a recent case in Maine.⁵²

(6.) There was at one time manifested a disposition in the English courts to make a change of national domicile depend upon a change of allegiance; so that an Englishman, in order to acquire a domicile in France, must have virtually intended to become a Frenchman.⁵³ But that doctrine is qualified by the later cases.⁵⁴ All that is now required to effect a change of domicile is, that the person should permanently abandon his present one, and take up another, with no present purpose of change or return.⁵⁵

(7.) If the person has actually changed his domicile, and fixed his establishment in another place, it will not be qualified by the motive inducing the change; as that the change of residence has been made in deference to the wishes of the wife, and that the house has been bought and furnished at her instance and with her money.⁵⁶

(8.) As the intention must concur with the fact, in order to constitute a change of domicile,⁵⁷ it is obvious, that persons, while laboring under complete mental prostration or aberration, cannot make such change. But some of the cases seem to have qualified this hitherto unbending rule.⁵⁸

(9.) There seems to be no question, in this country, that one may so become a fixed resident or householder in one state or place, as to create a domicile there, while at the same time he maintains, during the whole period of the continuance of such domicile, a determination some time, or even after a fixed period or the accomplishment of a particular business, to return to his former place of domicile.⁵⁹ And the origin of such temporary domicile will date from the time the person determined to remove, although after he left his former residence.⁶⁰

⁵¹ *Harvard College v. Gore*, 5 Pick. 370.

⁵² *Gilman v. Gilman*, 52 Me. 165.

⁵³ *Moorhouse v. Lord*, 10 Ho. Lds. Cas. 272; s. c. 9 Jur. n. s. 677.

⁵⁴ *Udny v. Udny*, L. R. 1 Ho. Lds. Sc. 441; *Haldane v. Eckford*, L. R. 8 Eq. 631.

⁵⁵ *Kirby v. Waterford*, 14 Vt. 414.

⁵⁶ *Aitchison v. Dixon*, L. R. 10 Eq. 589. ⁵⁷ *Story*, Conf. Laws, §§ 44, 47.

⁵⁸ *Anderson v. Anderson's Estate*, 42 Vt. 350.

⁵⁹ *Graham v. Trimmer*, 6 Kansas, 230.

⁶⁰ *Hampden v. Levant*, 59 Me. 557.

(10.) But this will not legalize a domicile assumed temporarily in another state, for the purpose of evading the laws of his own state, or placing himself in a more favorable condition to litigate a question than he would be if he removed where he was permanently domiciled and intended to remain so, except for such special motive. Such a merely colorable change of domicile will be regarded as an attempt fraudulently to evade the law of the domicile.⁶¹

(11.) It often happens that one changes his actual residence to another country on account of health or business, or for some cause, and there remains for a very long period, and ultimately with no expectation of ever being able to reach his former home, and which he always claimed as his only home, even after having abandoned all expectation of ever returning to it. In such case the domicile is not changed. The validity of all testamentary acts, and all rights of succession, must still be determined by the law of that place.⁶²

SECTION III.

THE MODE OF PROOF OF WILLS BEFORE THE COURT OF PROBATE.

1. Cases divided into contentious and non-contentious; or, those in common form, and those in solemn form.
- n. 1. Summary of the English practice, and present rules and orders of court.
2. When proof is made in common form, and when in solemn form.
3. Mode of proceeding where proof in solemn form is desired.
4. The American practice, in non-contentious matters, should be more simple.
5. The general practice here is to require the attendance of one of the witnesses.
6. Witnesses to wills should not be required to attend court, unless objection to will.
- * 7. One witness sufficient, if he remember all the requisites to valid execution. * 36
8. Witnesses not attainable, signatures, and that of testator, may be proved.
9. The different degrees of certainty resulting from the testimony of the subscribing witnesses.
10. The extent of search required to admit secondary evidence.
11. Witnesses to will regarded as such from the attestation.
12. The rule in equity stated somewhat differently.
13. The grounds for presuming the probate of a will stated.

⁶¹ *Jennison v. Hapgood*, 10 Pick. 97.

⁶² *Dupuy v. Wurtz*, 53 N. Y. 556, where the question is learnedly discussed.

- n. 21. American cases considered.
- 14. When testator's knowledge of contents of will should be proved.
- 15. In New York the courts of probate annex conditions limiting the extent of the probate.
- 16. But they do not assume to reform the will.
- 17. Error of fact not affecting testamentary intention of no effect.
- 18 and n. 25. Grounds upon which courts of equity compel discovery in aid of the proceedings of probate court.
- 19. Greater necessity for circumspection as to testator's knowledge of contents of will, where he is deaf and dumb, or blind.
- 20. The will should be proved in place of domicile, without regard to the locality of the personal estate.
- 21. The mode of stating the issue on appeals.
- 22. No objection to probate of will, that it is partly void.
- 23. No one but a party in interest can oppose the probate of a will; but the court will sometimes act *sua sponte*.
- 24. Probate of codicils alone. All the executors named, in all the papers proved, receive letters testamentary.
- 25. Codicil may be admitted to probate after probate of will closed.
- 26. When a codicil is made dependent upon the assent of another, such assent is indispensable to its becoming operative.
- 27. Probate of will or codicil must show due execution by testator.
- 28. Form of will considered.
- 29. Mode of proof. New trials.
- 30. The burden of proof in regard to revocation.

§ 3. 1. THE English courts of probate, both while that jurisdiction was retained in the ecclesiastical courts and in the present Court of Probate and Matrimonial Causes, make a formal division of causes for the proof of wills, into those in common form and those in solemn form; the distinction embracing to some extent the two classes of cases which with us are more commonly called contested and non-contested cases.¹

¹ Under the present English statute, 1 Vic. ch. 26, § 9, any will having a perfect attestation clause and the requisite number of witnesses may be admitted to probate, upon the affidavit of the executor alone, that he believes it to be the last will and testament of the deceased. If the attestation clause is defective, the affidavit of one of the witnesses is required. If the affidavit proves the execution to have been in fact regular, probate may be allowed; if not, intestate administration is granted. The rules established in the Court of Probate in England, under the preceding statute, in 1858, divide all business into two classes, — “contentious” and “non-contentious business.” The mode of proceeding is much the same as already indicated. The application for probate and for letters of administration is made to the registrar of the courts in the several districts, where the decedent had his domicile at the time of his decease; or where he had no such domicile in any district, to the principal registry, in all cases. Upon receiving the will the registrar inspects

* 2. But the distinction is not precisely the same as that * 37 between contested and non-contested cases with us, since in

the same, to find if all the statutory requisites have been complied with, and the attestation clause is regular. If any defect appear therein, it must be supplied by affidavit of one of the witnesses; or in default of that, by the next best evidence attainable. The defect being thus supplied, the affidavit forms part of the probate, that all may appear regular upon the face of the record.

The will appearing regular upon its face, or any apparent defects being supplied, the registrar examines to find if there are any interlineations or alterations; if so, proof must be given of their being made before execution, unless they are noted before the attestation of the witnesses, or in the margin, and attested by the initials of the witnesses' names, or else there must be proof of the re-execution of the will, or the valid execution of a codicil subsequent to making the interlineations or alterations. In default of their being accounted for in one of these modes, they will form no portion of the probate; but the probate will be enrolled, with the erased words, if legible, and if not legible, with blanks for the erasures, the interlineations being wholly omitted. If any doubt arise upon any of these points, the registrar communicates with the principal registry, and obtains the advice of the judge how to proceed. If every thing is made satisfactory, the probate is allowed.

Papers referred to, or where there is any indication that any paper has been attached to the will, and subsequently separated from it, such papers must be produced, or satisfactorily accounted for.

Wills merely in execution of a power will not be admitted to probate without consulting the judge and having his specific directions.

By the established rules of the English Court of Probate, the executor may be put to the proof of a will in solemn form, by the filing of a caveat in the Court of Probate for the district where the testator was domiciled at the time of his decease, requiring notice to the person filing the same of any application for probate, who must be either the next of kin or some one interested under the will. This caveat remains in force for six months, and must then be renewed. If application is made for probate after the filing of such caveat, the registrar gives the person filing the same warning of the application by letter addressed to the place specified in the caveat, conveyed through the post-office. And upon the party answering to the warning, "the matter shall be entered as a cause in the court-book, and the contentious business shall thereupon be held to commence."

Where there is no caveat filed, or no entry of appearance in reply to the warning, the executor may nevertheless proceed in solemn form, by issuing a citation to all persons interested in opposition to the probate of the will, which, in ordinary cases, will extend only to the next of kin in England,—the probate there extending only to the title of the personalty,—and in America, where the probate binds both real and personal estate, to the heir or heirs, and next of kin, which by special enactment in most of the states are identical. Or where probate has issued, in the first instance, in common form, those interested in opposition to the will may put the executor to prove

* 38 the proof of * wills in common form in the English courts of probate, no notice to those opposed to the will is given, and no one can object to the allowance of the proof. The executor acts his own discretion in regard to which form of proof he will adopt. If he is informed of objections being made against the will, or has reason to expect them, he naturally adopts the solemn form of proof. And on the contrary, if no ground of objection is known to exist, and no such objection is expected, he will naturally proceed in common form.²

3. Where proof in solemn form is intended, formal notice is given to all parties interested.³ And where the will is proved in the first instance in common form, any one interested in the

the same in solemn form by a citation to that effect, requiring also that the executor, within eight days, return the probate to the office of the registrar, and show cause why the same should not be revoked.

We have taken the foregoing summary of the rules of the present English Court of Probate, from those Rules and Orders established under 20 & 21 Vic. ch. 77, and 21 & 22 Vic. ch. 95.

The nature of the proceeding in the probate of the will in solemn form is well defined in *Brown v. Anderson*, 13 Ga. 171, as requiring that all parties in interest be duly cited to witness the proceedings, that the will be produced in open court, that the witnesses be there examined, and that all parties in interest have the privilege of cross-examination. Such probate, it is said, is conclusive. But we apprehend that probate in common form — that is, where no one appears to contest the probate — is generally conclusive, in the American practice, that commonly requiring, in all cases, general notice, by publication of the time and place of probate, whether in common or in solemn form, — the only practical difference in the two made in the practice of many states being, that the former is allowed where no objection is interposed, and the latter is always required where any contestant appears. But in some of the states the same distinction prevails between probate in common form and solemn form as in the English practice, the former being wholly *ex parte*, and not conclusive upon any one interested in the estate, and who shall demand probate in solemn form within the time allowed by statute. *Brown v. Anderson*, *supra*; *Armstrong v. Baker*, 9 *Ired.* 109; *Kinard v. Riddlehoover*, 3 *Rich.* 258; *Etheridge v. Corprew*, 3 *Jones, Law*, 14; *Carroll v. Llewellyn*, 1 *Har. & McHen.* 162. See also *Jones v. Moseley*, 40 *Miss.* 261; *Matthews v. Sontheimer*, 39 *id.* 174; *Murray v. Murphy*, *id.* 214; *Kelly v. Davis*, 37 *id.* 76; *Sartor v. Sartor*, 39 *id.* 760.

² 1 *Wms. Exrs.* 292-299.

³ The notice in such cases, in the American states, by statute, is only required to be by publication in some newspaper circulating in the place of the domicile of the testator. In the English practice, it seems to be by special summons. 1 *Wms. Exrs.* 299 *et seq.*

estate * may, within reasonable time,⁴ cite the executor to * 39 make proof of the will in solemn form, or per testes.

4. This is the form of proof most in use in the American states in regard to wills. But the proof of wills in common form exists in a considerable number of the American states.⁵ We shall scarcely be required to dwell longer upon this distinction. It may not, however, be deemed altogether out of place to suggest here, that if the practice in the American probate courts were made to conform more nearly to that of the English statute¹ in regard to all non-contested cases, requiring no production and proof by witnesses where no opposition appeared, and the will appeared regular upon its face, it would save considerable expense, sometimes, without much liability to error in consequence of the change. We have always felt surprise that witnesses should be required to attend the probate courts before any objection was made.

5. But the more common practice in the American probate courts is to require the attendance of at least one of the subscribing witnesses to the will at the time of probate, all objectors having been warned by general public notice to be present at that time, and interpose any objections they may have against the allowance of the will and probate of the same.⁶

⁴ This in some instances has been held to extend to thirty years. 1 Jarman on Wills (Perk. ed.), 223; *Noyes v. Barber*, 4 N. H. 406; 1 Wms. Exrs. 210. But in *Braham v. Burchell*, 3 Add. 243, a protest against the probate of a will in common form was refused, after the lapse of seven years. And in *Merryweather v. Turner*, 3 Curt. 802, it is said the next of kin is not barred by lapse of time or the receipt of legacies from calling upon the executors to prove the will in solemn form, but may be by other circumstances. The present English statute, 20 & 21 Vic. ch. 77, § 64, requires notice of the purpose of contesting the validity of probates in common form, where notice has been given of intention to use it in evidence, and unless the protest against using it as evidence is filed in conformity to the statute, the probate becomes conclusive, in that case to all intents the same as one in solemn form. *Barraclough v. Greenhough*, Law Rep. 2 Q. B. 1, 612; s. c. 15 W. R. 934; 8 B. & S. 623.

⁵ Mr. Perkins, in his edition of Jarman, vol. i. pp. 222, 223, enumerates New Hampshire, Virginia, Tennessee, and some others. Ante, n. 1.

⁶ Ante, Vol. I. pp. 30-51. This subject is here so extensively discussed, that we need not further attempt it. We think it ought to be established as a standing rule of practice in courts of probate, that the affidavit of one of the witnesses, taken out of court, shall be sufficient to establish a will that is regular upon its face and contains a perfect attestation clause, where no objection to the probate is interposed. And it has been lately decided in the

* 40 * 6. There can be no adequate reason for requiring the attendance of one of the witnesses, or, as is sometimes done, of three, where all parties objecting to the probate have been warned to appear, and no objection is interposed. And there can be no ground for the argument in favor of this course, that no one can know beforehand whether objections will be made or not; since in a course of practice where all wills are required in the first instance to be proved in solemn form, it would be but reasonable to give the executor, or those propounding the will for probate, an opportunity, at an after term or adjourned session of the court, to meet any objections which should be interposed.⁷

English Court of Probate that in contentious proceedings, the party propounding the will is not bound to call both the attesting witnesses. *Forster v. Forster*, 33 L. J. N. S. Prob. 113. But if the one called testify against the execution of the will, he must call the other. *Owen v. Williams*, 9 L. T. N. S. 86; 32 L. J. N. S. Prob. 159. The practice in the English courts is, where the witnesses to a will, or some of them, reside abroad, and their attendance cannot be procured, to appoint a commission of one or more persons, who may act either jointly or severally, for taking the testimony of such absent witnesses, and for this purpose to attach the original will to the commission, an attested copy being first deposited in the registry. *Forster v. Forster*, 10 Jur. N. S. 594. In such cases, where a commissioner is appointed in an ex parte suit, he must be nominated by the court, and not by the party. *Lodge v. Lodge*, 32 L. J. N. S. Mat. Cas. 93.

⁷ A course of practice, under rules somewhat similar to those prevailing in the English Court of Probate, would be found, we believe, exceedingly useful and acceptable in the American courts of probate. But from the fact that many of the judges are not professionally educated, and that frequent changes in the incumbents occur in many of the states, it is more difficult to introduce the needful changes in the practice of those courts. It seems to be expected by many, that the legislatures in the several states will see to these matters in due time. But, for many reasons, that is the last place where it ought to be looked for, or where it could fairly be expected to be wisely cared for. But in some of the states, perhaps a majority, the statutes, either expressly or by necessary or reasonable construction, require that all the subscribing witnesses should give testimony in order to establish a will in the Probate Court even where no opposition is interposed. In *Allison v. Allison*, 46 Ill. 61, the rule seems to be laid down in a more stringent form than we have elsewhere noticed. It is here said: "Our statute requires, before a will can be admitted to probate, that the subscribing witnesses shall swear they believe the testator to have been of sound mind and memory" at the time of execution thereof; and that where a witness testified that "he did not know whether the testator was of sound mind or not; he might have been or might not," the proof was defective; that as the witness unquestionably had some opinion in regard to the testator's competency the law made that an

* 7. In addition to what we have just referred to,⁶ we may * 41 suggest here, that in contentious causes in the Court of Probate, those who propound the will should produce all the witnesses, or account for their absence. It will not be required in all cases that all the witnesses should be examined by them, since the testimony of one witness, whose memory is distinct to all the requisite points of the proof, will be sufficient to make a case. It is not requisite in some of the states that the attestation of the other witnesses be proved by their own testimony. For, although the law requires more than one witness to the execution of a will, it is not because any different measure of proof is intended to be thereby established, in the case of wills, from that which obtains in all cases, — that of the testimony of one credible witness. The greater number of witnesses are required in the authentication of wills, in order to guard against fraud or imposition, and to secure satisfactory proof, after the lapse of the long period of time and the numerous accidents liable to occur between the execution of wills and the time of probate, which in many instances extends over many years. That this is so will readily occur to all, when it is considered that the proof of the due execution of a will sometimes rests upon the testimony of one witness corroborated by circumstances, where both the other witnesses to the transaction are either wholly oblivious in regard to it, or else deny either their signatures or the fact of being present at the execution. And even where all the witnesses except one were deceased or beyond the jurisdiction of the court, and the witness present deposed that the attestation was to the blank signature of the testator, the will was nevertheless admitted to probate upon the general presumption that the will was written before the signature of the testator, founded upon the ordinary mode of doing business of that character.⁸ And in *Lowe v. Jolliffe*⁹ the will was established, notwithstanding all the witnesses testified that the testator at the time of

indispensable prerequisite to the admission to probate. We can only say that we should expect so unbending a rule of proof must require considerable modification, either by the legislature or the courts, before it would be found to work well in practice. And in the same state, *Gardner v. Ladue*, 47 Ill. 211, it was held that proof of a will in a foreign state, according to the law of that state will be sufficient, of course, although established by the testimony of one witness only.

⁸ *Lloyd v. Roberts*, 12 Moore P. C. 158; ante, Vol. I. p. 218, and n.

⁹ 1 Wm. Bl. 366.

signing his will was utterly incapable of making a will, or
 * 42 transacting any business whatever.¹⁰ Some of *the judges
 who have discussed this point insist that the executor, or
 those who attempt to establish the will, must first examine all
 the witnesses, in order to give the objectors the benefit of cross-
 examining them, either upon the point of due execution or of the
 sanity of the testator; but we apprehend that nothing more is
 fairly demanded in such cases than what is stated by *Spencer*, Ch.
 J., in *Jackson v. Le Grange*:¹¹ “I consider it well settled, that
 on a trial at law, where the execution of a will comes in question,
 the party supporting or claiming under it is not under the neces-
 sity of calling more than one of the subscribing witnesses, if he
 can prove the execution; . . . but if the witness cannot prove
 these requisites, the other witnesses ought to be called.” It is
 probably true that the opposing party, in putting the other wit-
 nesses upon the stand, may have somewhat the benefit of cross-
 examination in the way of putting leading inquiries, and some
 cases say even by showing that the witness had made declarations
 out of court inconsistent with the validity of his attestation of the
 will as a valid instrument, or that he did not believe the testator
 of sane mind at the time of execution, and that he had attested
 it merely to please him.¹²

8. It seems to be conceded on all hands, that where the sub-
 scribing witnesses, one or more, are disqualified from giving testi-

¹⁰ *Jauncey v. Thorne*, 2 Barb. Ch. 40, 52, 53, where this and analogous questions are extensively discussed by the learned Chancellor. Ante, Vol. I. pp. 32-39. See also *Jackson v. Christman*, 4 Wend. 277.

¹¹ 19 Johns. 386, 388.

¹² *Townshend v. Townshend*, 9 Gill, 506; *Harden v. Hays*, 9 Penn. St. 151. But see *Baxter v. Abbott*, 7 Gray, 71; *Weatherhead v. Sewell*, 9 Humph. 272; post, pl. 11. In *Bowman v. Hodgson*, Law Rep. 1 P. & D. 362, it was decided that the party propounding the will must call one of the attesting witnesses to prove its due execution, and such seems to be the practice in that court and equally in the American courts, where there is no serious contest. But see Vol. I. Chap. III. § 5, where the question is examined more at length. In another case, *Coles v. Coles*, 1 P. & D. 70, it was held that where the person propounding the will calls one of the witnesses, who fails to prove the will, he must call the other, although he knows his evidence will be adverse; and, if it prove so, he may prove the requisite facts by other witnesses, and may prove that the witness has made statements inconsistent with his testimony, although he denies having done so and is not in fact a hostile witness.

mony subsequent to the time of attestation, or have deceased, or removed beyond the jurisdiction of the court, so that their testimony cannot be had, the will may be established by proving the handwriting of the witnesses and of the testator; and some authorities say, by proving that of the witnesses alone, — although it would seem, that where the execution of such an instrument as a will, requiring such formalities, is attempted to be established by circumstantial * evidence, it could not fail to strike * 43 all minds, that proof of the signature of the testator would be essential.¹³

9. It is obvious that the testimony of the witnesses to the execution of a will, after the lapse of the considerable period liable to intervene between the execution and the probate, must be of almost every grade of certainty, or uncertainty, as to the main fact inquired after. They may, one or more of them, be able to recall the scene of the execution of the instrument, and to declare the compliance with every minute particular required by the law; or they may have no such minute memory of the particulars which occurred, and may still be nearly as confident of their occurrence, either from their general knowledge of what was required to the validity of the execution, and being assured from general habit that those particulars occurred or they would not have subscribed their names as witnesses, or if they had done so, and any thing peculiar had occurred or been omitted, they should have recollected it; or else from the enumeration of all the particulars in the attestation clause, and having subscribed it, they may feel more or less assurance that such facts occurred; or they may have no recollection of the transaction, and only be able to identify their own signatures, and to state their presence from that fact; and this alone will raise a *primâ facie* presumption, when the attestation clause is regular, that all the particulars there enumerated did occur. And even where the attestation clause is omitted, or is defective, — which is perhaps more unfavorable than its entire omission, — there still remains a *primâ facie* presumption that all which appears upon the face of the will occurred in the order in which it there appears, and as the law requires it should be done; upon the natural pre-

¹³ *Dean v. Dean*, 27 Vt. 746. The authorities are here discussed somewhat in detail by Mr. Justice *Isham*. See also *Sears v. Dillingham*, 12 Mass. 358, 361, 363; *Carrington v. Payne*, 5 Vesey, 404, 411; *Patten v. Tallman*, 27 Maine, 17, 29.

sumption that every one knows the law and will be disposed to comply with its requirements, so far as any transaction in which he engages is concerned, according to the maxim, *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*.¹⁴

¹⁴ Ante, Vol. I. pp. 228, 243, and cases cited. In *Clarke v. Dunnivant*, 10 Leigh, 13, *Tucker*, President of the Court of Appeals, said: "On a question of probate, the defect of memory of the witnesses will not be permitted to defeat the will; but that the court may from circumstances presume that the requisitions of the statute have been observed, and that they ought so to presume from the fact of attestation, unless the inferences from that fact are rebutted by satisfactory evidence." See also *Bennett v. Sharp*, 33 Eng. L. & Eq. 618.

In the State of New York, before different courts, most of the questions affecting the probate of wills have been very extensively discussed. See *Peebles v. Case*, 2 Bradf. Sur. Rep. 226. In *Wilson v. Hetterick*, 2 id. 427, it was held, that the inability of the witnesses to remember any testamentary declaration of the testator, in the case of a will recently executed, and when publication is expressly required by statute, must be regarded as fatal to the proof. But it is otherwise where the transaction is of long standing, especially if the attestation clause is perfect. *Chaffee v. B. M. C.*, 10 Paige, 85, 90. Where the witnesses to the will are all strangers to the testator, — which, contrary to the old practice, where a man invited his friends to become the witnesses of this solemn act, is now too often the fact, — it will become necessary to establish his identity by independent proof of his handwriting, or in some other satisfactory mode. *Mowry v. Silber*, 2 Bradf. Sur. Rep. 133. The requisites to the validity of a will must be those in force at the time of its execution; but the mode of procedure is that in force at the time the will is propounded for probate. *Jauncey v. Thorne*, 2 Barb. Ch. 40, 50, by *Walworth*, Chancellor. The Court of Chancery in New York may, by statute, issue a commission for the proof of a will, either of real or personal estate, in all cases where, from the absence of the will or the non-residence of the witnesses, it cannot be proved in the usual manner before the Surrogate. *Matter of Hornby*, 2 Paige, 429. But this power is limited to the Chancellor, and cannot be exercised by a Vice-Chancellor. *Ib.* A merely temporary absence of the witnesses to a will does not justify the probate upon proof of their handwriting; they must reside permanently abroad. *Stow v. Stow*, Redf. Sur. Rep. 305.

It was held in an early case in Massachusetts (*Chase v. Lincoln*, 3 Mass. 236), that any party interested in the probate of the will might insist upon the production of all the witnesses, if living, and subject to the process of the court. But if it is impossible to procure any one of them, the court will proceed without him, *ex necessitate*. But it is no objection to the validity of the probate of the will, that it appears on the face of the record that all the witnesses were not present. The legal presumption in favor of the record will imply there was some valid reason for the absence. *Brown v. Wood*, 17 Mass. 68, 72, 73. Where testimony is taken through the agency of an interpreter, it should appear that he was sworn. *Amory v. Fellowes*, 5 Mass. 219. But,

* 10. The degree of diligence required in the search for * 44 the subscribing witnesses to a will is the same which the law requires in all cases, to prove loss. It must be bonâ fide, earnest, and intelligent,—such as one puts forth in attempting to learn the residence * or place of business of any one, * 45 when it becomes important to his interest to learn such facts; it must be made in all places where the witnesses might be supposed to be found, after making inquiry in all places and of all persons where and of whom intelligence may fairly be supposed attainable.¹⁵ Search should be made for all the living witnesses.¹⁶

11. Where evidence is given of the witnesses to the will having conspired to perpetrate a fraud in the fabrication of the will, it has been held that this is such an impeachment of their veracity that general evidence of good character is admissible in reply, even where some of the witnesses were dead.¹⁷ It is regarded the same as if the witnesses had given testimony of the facts implied or embraced in the attestation,¹⁸ and were shown, out of court, to have made statements or done acts in conflict with such testimony.

12. Ancient wills have been established upon proof of the signature of the testator alone, the instrument appearing regular in other respects.¹⁹ The rule in chancery upon a bill to establish a will is, or has been regarded, as somewhat more stringent in regard to proof than that which we have indicated in the preceding paragraph. The rule there, as stated by an eminent equity judge in America, is that all the subscribing witnesses, if living and competent to testify, must be called by the party seeking to establish the will, and must be examined by him, so as to give the adverse party an opportunity to cross-examine them as to the sanity of the testator, and the circumstances attending the execution of the will.²⁰

after judgment, this will be presumed. If a witness is dead, or out of the jurisdiction of the court, proof of his handwriting will be held *primâ facie* evidence that he duly attested the will. *Nickerson v. Buck*, 12 Cush. 332; *Engles v. Bruington*, 4 Yeates, 345.

¹⁵ 1 Greenl. Ev. § 574, and cases cited.

¹⁶ *Miller v. Miller*, 2 Bing. N. C. 76; *James v. Parnell*, Turn. & Russ. 417.

¹⁷ 2 Phil. Ev. (Cowen & Hill's ed.) 978; 2 Starkie Ev. 1268.

¹⁸ *Walworth*, Chancellor, in *Scribner v. Crane*, 2 Paige, 147; ante, Vol. I. § 13, pl. 5.

¹⁹ *Duncan v. Beard*, 2 Nott & McC. 400.

²⁰ *Walworth*, Chancellor, in *Jauncey v. Thorne*, 2 Barb. Ch. 40, 52; ante,

13. After a great lapse of time, a will appearing regular upon its face, and found in the proper custody, i.e., in the office of the Secretary of State, in a state where the probate of wills is effective to pass real as well as personal estate, although affording no * 46 other * evidence of probate, was held admissible in evidence.²¹ But we do not well comprehend how the probate of a will can fairly be presumed, unless there were evidence of the destruction of the records of the court having the appropriate jurisdiction, or else some proof from which it might reasonably be inferred that such record might not have been made, even where the probate had been passed. In ordinary cases, the mere fact of the non-appearance of the record of the probate in the proper place of deposit, would afford such conclusive evidence against its having ever existed, as to put at defiance all rational presumption to the contrary.

Vol. I. pp. 32-39. The same rule prevails in Vermont as in the courts of chancery. *Thornton v. Thornton*, 39 Vt. 122; and probably in many of the other states. *Chase v. Lincoln*, 3 Mass. 236; *Brown v. Wood*, 17 id. 68, 73. But see contra, *Field's Appeal*, 36 Conn. 277, where it is held the party propounding a will need not call all the subscribing witnesses in his power, unless that is insisted upon by the contestants, when he may be required to place them on the stand.

²¹ *Stephens v. French*, 3 Jones, Law, 359. The question of the effect of the lapse of time in regard to the probate of wills has been a good deal discussed in the American courts. The English rule of admitting a will after the lapse of thirty years, where it comes from the proper custody, and especially where the possession has been in accordance with its provisions, to be read without proof of its execution, seems generally to have prevailed in those states where the probate of the will only operates upon the title to personalty. 1 Greenl. Ev. §§ 21, 142-144; *Northrop v. Wright*, 7 Hill, 476; *Staring v. Bowen*, 6 Barb. 109; *Jordan v. Cameron*, 12 Ga. 267; *Hall v. Gittings*, 2 Har. & J. 112. The New York cases seem to require, in order to admit a will to be read in evidence without proof of execution, that it be more than thirty years old, and that the possession shall have followed its provisions, or that there be other equivalent grounds for presuming it genuine. *Jackson v. Luquere*, 5 Cow. 221; *Same v. Thompson*, 6 id. 178; *Same v. Christman*, 4 Wend. 277; *Fetherly v. Waggoner*, 11 id. 599; *Jackson v. Laroway*, 3 Johns. Cas. 283. It seems that in those states where the probate is evidence in regard to real as well as personal estate, that an ancient will, where there appears some, although defective, proof of probate, will be received in evidence, the presumption *omnia rite acta* being corroborated by the lapse of time. *Giddings v. Smith*, 15 Vt. 344; *Jordan v. Cameron*, 12 Ga. 267. It is no fatal objection to the probate of a will that more than twenty years have elapsed since the decease of the testator. *Shumway v. Holbrook*, 1 Pick. 114.

14. There has been considerable discussion in the courts and among text-writers, as to the degree of proof required, or the ground of presuming, that the testator knew the contents of the instrument propounded as his will at the time of executing the same, and much nice learning might be collected upon the point. But we apprehend that where the testator is shown to have executed an instrument as his will, being in his right mind and of ordinary capacity, and no circumstances appearing to induce suspicion of * fraud or imposition, it will be presumed that he was * 47 aware of its contents. But in many cases there may be special reasons for requiring more careful inquiry into the fact of the testator's knowledge of the contents of the paper executed as his will. If he is in extreme old age, more or less imbecile in understanding, surrounded by interested parties, incapable of reading or writing, either from loss of sight or want of education, and in some other cases, probably, it might be no more than reasonable to require something more than the ordinary ground of assurance upon that point. And this will be so in an especial manner where the provisions of the will are extraordinary or unnatural. But, notwithstanding all these considerations, and some others which might occur, we are not aware that any rule of law can be laid down in regard to it. It must be left to the consideration of the triers of the facts, under all the circumstances of the case, whether the testator executed it understandingly.²²

²² *Billinghurst v. Vickers*, 1 Phillim. 187; *Rodd v. Lewis*, 2 Cas. temp. Lee, 176; *Goose v. Brown*, 1 Curt. 707; *Fawcett v. Jones*, 3 Phillim. 434, 476; *Wheeler v. Alderson*, 3 Hagg. 574, 587; *Browning v. Budd*, 6 Moo. P. C. C. 430; *Durnell v. Corfield*, 1 Rob. 51. If the party benefited under the will drew it up, very satisfactory proof should be given that the dispositions were freely made by the testator. *Croft v. Day*, 1 Curt. 784; s. c. 3 Moore, P. C. C. 136. And the same rule seems to have been acted upon in the Ecclesiastical Court, where the testator was blind, or unable to read from defect of education. *Barton v. Robins*, 3 Phillim. 455, n. (b); *Fincham v. Edwards*, 3 Curt. 63; s. c. affirmed, 4 Moo. P. C. C. 198; ante, Vol. I. pp. 54, 58. But this rule will only apply to such wills as are unofficious, or contrary in some respects to the natural affections of the testator. 1 Wms. Exrs. 312; *Brogden v. Brown*, 2 Add. 441, 449. But the general rule seems to be that proof of the testator's signature to the will is *prima facie* evidence of his having understandingly executed the same. *Weigel v. Weigel*, 5 Watts, 486; *Beall v. Mann*, 5 Ga. 456. The testator's mark is not regarded as his signature or as presumptive evidence of his having directed his name affixed to the instrument, as is said in *Greenough v. Greenough*, 11 Penn. St. 489. But actual proof

* 48 * 15. In one case where the question received considerable attention,²³ it was held, that where the testator, having sufficient testamentary capacity, but with his mind in a debilitated and prostrate condition, himself gave instructions to counsel for drawing his will shortly previous to his death, but did not himself comprehend the legal force of the general disposition which he directed to be made by the terms of his will, by reason of supposing that a leasehold interest in land would pass as real estate, it being in fact mere personalty, and passing as such in law, that the will could only be admitted to probate under a limited decree, and to the extent only that it correctly expressed the testamentary intentions of the testator.

of the reading over of the will in the hearing of the testator and the witnesses, at the time of the execution, is not now expected in the case of testators retaining the full possession of their faculties, and is not required even in the case of those deficient in one or more of the senses, but in such cases, and equally where the scrivener is benefited by its provisions, or in the interest of those who are benefited, it is highly proper the court, or triers, should be watchful to assure themselves that no imposition was practised upon the testator. *Mitchell v. Thomas*, 6 Moore, P. C. C. 137.

And it is, of course, requisite to the proof of a will, that the testator, at the time of its execution, should have known and approved its contents. *Hastilow v. Stobie*, Law Rep. 1 P. & D. 64. See also *Cleare v. Cleare*, id. 655; *Morritt v. Douglas*, L. R. 3 P. & D. 1. And if there is sufficient reason to believe that was not the fact, the probate cannot pass. *Harris v. Vanderveer*, 21 N. J. Eq. 561. But if a will has been read over to a capable testatrix and duly executed, certain words contained in it will not be excluded from the probate, because they are not in accordance with her instructions to the solicitor, or with the draft will approved by her, even where the solicitor, who prepared the will, swears that the words were inserted without her instructions, by his own inadvertence. *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109; s. p. *Atter v. Atkinson*, id. 665. But oral proof is admissible to show, where two wills are presented for probate, which of them was last executed by the testator although that one may bear the earlier date. *Reffell v. Reffell*, L. R. 1 P. & D. 139. See also *Thomson* in re, id. 8.

²³ *Burger v. Hill*, 1 Bradf. Sur. Rep. 360. The Surrogate, Mr. Bradford, here discussed, with great learning and ability, both the authorities and the principles involved. It is declared in the subsequent case of *Creely v. Ostrander*, 3 Bradf. Sur. Rep. 107, that the jurisdiction of the surrogate, in respect to the correction of mistakes, is, by the necessary operation of the statute, merely negative, and limited to refusing probate of a will or part of a will, and does not extend to inserting any matter into the instrument, however certain it may be that it was the purpose of the testator that it should have so read. These decisions go upon general grounds, and not upon any special provisions of the New York statutes.

16. It is not here attempted to reform the instrument so as to make it speak the real intentions of the testator. No court can do this. But, inasmuch as he gave his personalty to one and his real estate to others, intending thereby to pass a valuable leasehold interest, but which, by the terms of his will, would pass under the clause intended to embrace only the remaining personalty, the probate court excluded it from the operation of the will, thus leaving it to pass under the general statutes of distribution, having no power to direct that it should pass, according to the intention of the testator, as real estate under the general clause directed by *him to be inserted in his will for that purpose. The * 49 question of the power of courts of equity to reform wills came under consideration in the case of *Box v. Barrett*,²⁴ where the testator distributed his property unequally among his daughters, upon the declared ground of equalizing their portions, reciting that two of them would become entitled to settled estates, upon the testator's decease, when, in fact, they were all equally entitled under the settlement. Lord *Romilly* held that no case of election arose, because the will did not profess to affect the settled estates, and, upon the question of reforming the instrument, said, "Because the testator has made a mistake, you cannot afterwards remodel the will, and make it that which you suppose he intended, and as he would have drawn it, if he had known the incorrectness of his supposition."

17. It is no sufficient ground to refuse the probate of the will that error in matter of fact has been committed by the testator, *unless it be of a character to defeat his testamentary intentions.²⁵

18. It is suggested elsewhere that there is but slight occasion

²⁴ Law Rep. 3 Eq. 244. And where husband and wife attempted to make wills at the same time, each in favor of the other, but, by mistake, each signed the will of the other, it was held to be such a mistake as the courts could not correct, even by the aid of a special act of the legislature; since, the right of the heirs having vested at the decease of the testators, the legislature could not interfere, there being, in fact, no execution of the wills. *Alter's Appeal*, 67 Penn. St. 341. The same mistake occurred in a recent English case, where two sisters, intending to execute wills in favor of each other, by mistake executed each the will of the other, and Sir *J. Hannen*, in the Court of Probate, said, "A most unfortunate blunder has been committed, and I regret that I have no power to do any thing to repair it." In the goods of *Hunt*, 23 W. R. 553.

²⁵ *Boell v. Schwartz*, 4 Bradf. Sur. Rep. 12; *Barker v. Comins*, 110 Mass. 477.

for courts of equity to interpose in aid of the courts of probate, in this country, by way of compelling discovery, since the probate courts have that power, to a considerable extent, upon general principles, and fully under the statutes which exist in most of the states, admitting the parties to give testimony without restriction. The same course of practice obtained in the English courts of equity, and for similar reasons, except as to that last stated, while the probate jurisdiction remained in the ecclesiastical courts. But since the change of probate jurisdiction in England to a separate tribunal, which has not the same power to compel discovery from parties, it has been considered that a bill for discovery in aid for proceedings in the Court of Probate may be maintained in the courts of equity.²⁶

19. In the case of testators being deaf and dumb, or blind, * 50 there * will obviously arise greater necessity for circumspection on the part of the tribunals where the testamentary act is offered for probate. It is said, in a recent English case,²⁷ that in the case of a deaf and dumb testator, who could neither read nor write, and who conversed by signs and not by means of the deaf and dumb alphabet, probate would not be granted, unless the nature of the signs by which the testator signified his knowledge and approval of the contents of the will were made known to the court, so that they could form an estimate of their reliability.

20. It makes no difference in regard to admitting a will to probate, in the place where the testator had his last domicile, that the instrument professes to deal exclusively with property out of that jurisdiction, since personal property, wherever situate, follows the person.²⁸

21. In appeals from the probate court, in contested cases of the probate of wills, the procedure is somewhat varied from that

²⁶ *Fuller v. Ingram*, 5 Jur. n. s. 510. Sir *W. Page Wood*, V. C., here said: "It is possible the Court of Probate may examine witnesses upon interrogatories; but a question might arise whether, when you have the answer to the interrogatory as to documents, you could enforce the production of those documents as you can in equity." For this reason alone, if for no other, he considered the bill should be retained, and that, after interrogatories filed, proceedings should be stayed until they were answered, and all proper redress afforded. s. c. 28 L. J. n. s. Ch. 432.

²⁷ *Geale in re*, 33 L. J. n. s. Prob. 125; 12 W. R. 1027; Dig. 10 Jur. n. s. 185.

²⁸ *Winter in re*, 30 Law J. n. s. Prob. 56. Post, § 4, n. 34.

adopted in the first instance, where no formal issue is commonly placed upon the record. It is common on such appeals, for the appellant to state the reasons for the appeal, as that the testator made no valid will, by reason of want of testamentary capacity, undue influence, fraud, or other defect; or, where the will is disallowed in the first instance, the appellant will allege that he duly executed his last will and testament, making profert of the same. In such case the appellee in reply will make a general denial that such instrument was the last will of the decedent, or he may assign the special grounds upon which the validity of the instrument is denied. It is not common for the parties to thus narrow the issue upon the record, unless where the alleged defect or informality is susceptible of being distinctly presented, so as to refer the question to the court, as one of law.²⁹ But the practice is very different in the different states, and more commonly, perhaps, the issue is raised by a general averment, that the instrument propounded is, or is not, the last will of the decedent, thus involving all questions of law and fact in the most general form. But in many of the states the practice requires the issue to be specially and strictly defined.³⁰

* 22. It is no objection to the probate of a will that some * 51 of its provisions are not valid or susceptible of being carried into effect. The formal probate only establishes the instrument so far as it is valid and legal, and within the power of the testator to effect his purposes in that mode.³¹

23. No one can oppose the probate of a will but the heir or next of kin, or some one interested in the provisions of the will.³² It has been held to be well-settled law in the ecclesiastical courts, that one who has acquiesced in proof of the will in common form, and even received a legacy under the probate in that form, may nevertheless cite the executor to make proof in solemn form by paying the amount of the legacy into court. (a) And the view is

²⁹ *Howe v. Pratt*, 11 Vt. 255; *Baker v. Goodrich*, 1 Aikens, 395.

³⁰ *Glover v. Hayden*, 4 Cush. 580. As to proof of handwriting and the testimony of experts and the introduction of papers and photography of signatures, for the purpose of comparison, see *Merchants' Will*, Tucker, Sur. Rep. 151.

³¹ *Clemens v. Patterson*, 38 Ala. 721.

³² *Taff v. Hosmer*, 14 Mich. 249.

(a) *Bell v. Armstrong*, 1 Add. 365, and cases cited.

maintained in some of the American states. (b) But the English courts have said that the courts having jurisdiction in probate matters will withhold consent to the proof of a paper in common form, which they are satisfied could not be established in solemn form, notwithstanding proof of the assent of all parties having the right to contest the probate.⁸³

24. There are instances of granting probate of codicils without the will, where it appears they were intended to operate independently of the will.⁸⁴ And where probate is granted of two or more papers, as together containing the will of the deceased, it is the practice to make the grant to all the executors named in all the papers.⁸⁵

25. The probate court, after admitting a will to probate, and after the time for appealing from the decree has passed, may admit to probate a codicil to the same will, written upon the back of the same leaf upon which the will was written, if such codicil escaped attention and was not passed upon at the time of the probate of the will.⁸⁶

26. Where the testator made a codicil to his will, and in the conclusion of the same gave his wife the option whether to attach it to his will or not, "as she may think proper or necessary," the validity of the paper was held to depend upon the condition of the wife's assent; and, as she dissented, it was held not to form part of the will.⁸⁷

27. There must be evidence, either positive or presumptive, that the testator either signed, or acknowledged his signature to, the will, in the presence of the witnesses, before attestation. When the

(b) *Hamblett v. Hamblett*, 6 N. H. 333, and a case decided in 1874, not yet reported.

⁸³ *Tolcher in re*, 3 Add. 16. See also *Adams in re*, 3 Hagg. 258; *Ross in re*, 1 Hagg. 471.

⁸⁴ *Tagart v. Hooper*, 1 Curt. 289; *Clogstoun v. Walcott*, 5 Notes of Cases, 623; *Goods of Greig*, Law Rep. 1 P. & D. 72; *Black v. Jobling*, id. 685; *Turner in re*, L. R. 2 P. & D. 403.

⁸⁵ *Goods of Morgan*, Law Rep. 1 P. & D. 323; post, § 6. And probate of two testamentary papers, executed at different times and inconsistent with each other, may be had as together forming the last will. *Griffith in re*, L. R. 2 P. & D. 457.

⁸⁶ *Waters v. Stickney*, 12 Allen, 1; post, § 15, pl. 9 et seq.

⁸⁷ *Smith in re*, L. R. 1 P. & D. 717.

proof fails of this, or shows the contrary, the paper cannot be admitted to probate as testamentary.³⁸

28. The form of wills is almost infinitely various. A duly executed paper, in these terms, "I wish my sister to have my bank-book for her own use," — the court being satisfied on the evidence that the deceased, at the time of the execution, intended it to become operative after her decease, and not before, — was admitted to probate as testamentary.³⁹

29. The mode of weighing evidence, and its force and effect, will be the same in probate cases as any other; and the exercise of the discretion of the probate court in granting new trials will not vary essentially from what it is in courts of common law.⁴⁰

30. It has been said, that where the party propounding a will, for any cause, is unable to produce the document, or to show how it was destroyed, except that it was not found among the papers of the deceased testator, the burden of proof is upon such party to satisfy the court that it was not revoked.⁴¹ But when the proponent is able to produce the instrument, and to prove its due execution, the burden of proof is upon the opponents to show revocation.⁴²

SECTION IV.

SPECIAL FORMS OF PROBATE AND OF LETTERS TESTAMENTARY.

1. Separate letters of administration not granted to co-ordinate and joint executors.
- n. 2. Probate of will in fac-simile.
2. Portions of the will excluded from probate if not legitimately of it.
3. Different executors may have separate and distinct functions by their letters.
4. Will limited in operation, general administration may be granted of remainder.
- * 5. Form of probate. Translation of foreign wills. * 52
6. Probate court may be compelled to proceed by mandamus, having no valid excuse.

³⁸ Swinford in re, L. R. 1 P. & D. 630.

³⁹ Cock v. Cooke, L. R. 1 P. & D. 241. See also *State v. Ames*, 23 La. Ann. 69.

⁴⁰ *McKinley v. Lamb*, 56 Barb. 284.

⁴¹ *Welch v. Phillips*, 1 Moore, P. C. C. 299.

⁴² *Hitchins v. Wood*, 2 Moore, P. C. C. 355, 447.

- n. 15. Prohibitions may issue to probate court.
- 7. All papers of testamentary character must be probated.
- 8. Wills in execution of powers required to be proved.
- 9. But paper appointing guardian not entitled to probate.
- 10. Construction adopted where it is claimed later will destroyed, in order to revive an earlier one.
- 11. Probate may be allowed of a will so executed as to operate by way of appointment.
- 12. The extent of the probate may be limited to certain property.
- 13. A married woman may revoke a former will of appointment, without the assent of her husband, he having no interest in the property appointed.
- 14. Wills not entitled to probate.
- 15. Will naming executor entitled to probate.
- 16. Probate court may correct date of will in probate after same has issued.
- 17. Oral proof of the testator's purpose in making paper sometimes received.
- 18. Will may be admitted to probate, excluding particular portion.
- 19. Probate of different papers or instruments, as together constituting the will.
- 20. Void will is inoperative as to widow electing to take under will.

§ 4. 1. IN the English practice, several joint executors may come in and take letters testamentary and of administration at different times, a copy of the probate of the will being attached to each; and the powers thus conferred will be joint and co-ordinate, it would seem.¹ But nothing of this kind, as a general thing, exists in the American courts of probate. All the executors who accept the trust join in the application for probate and for letters testamentary; and where the powers of the executors are co-ordinate and joint, but one letter of administration, with the probate of the will, is issued.²

¹ 1 Wms. Exrs. 334.

² In the English practice, in cases where the construction of the will is liable to be affected by the precise form in which erasures, interlineations, or alterations appear upon the face of the instrument, the court will order the probate to pass in fac-simile. 1 Wms. Exrs. 298. But in all such cases it is understood, that the fac-simile copy made for the probate will embrace only such alterations as are shown satisfactorily to have been made before execution. 1 Wms. Exrs. 298; *Gann v. Gregory*, 3 DeG., M. & G. 777. The object of the fac-simile is that the form of the alterations may help to show the intention of the testator in making them, as where he writes in his will, "I give A. B. an annuity of £500, and I give him also £1,000," and then strikes out down to and including the word "£500." 3 DeG., M. & G. 780. Or we may suppose the words "to be equally divided amongst them" interlined, without any *caret* to show where they were intended to come in, and in such a position that they are applicable to two sets of legatees. In such a case, a fac-simile probate is the only one which can preserve the true force of the original; and for the Court of Probate to determine where they are to be

2. It is customary in the English practice to exclude portions of the will from probate, where they do not legitimately belong to the instrument; as, for instance, where a particular clause has been inserted by fraud, without the knowledge of the testator, in * his lifetime; ³ or where it is done by forgery after the death * 53 of the testator; ⁴ or where a particular portion of the will has been induced by fraud of the party in whose favor it is; ⁵ or where actual incapacity is shown at the time of making the latter portion of the will. ⁶ In all these, and other analogous cases, the Court of Probate, in England, is accustomed to grant probate and letters testamentary of that portion of the will which is established. ⁷ And we see no reason why the same course may not be pursued here. But it has been held that the court cannot, even with the consent of all parties interested, expunge from the probate any parts of the will which constitute operative portions of the instrument. ⁸ But offensive passages have sometimes been allowed to be

inserted, is to settle the construction of the instrument in that particular beyond all recall. 1 Wms. Exrs. 298, and n.

In a recent English case, where the name of an executor in a duly executed will had been obliterated, and another name substituted by the testator, the obliteration and substitution not being duly executed, it was said the court will direct the original name restored in the probate, if satisfied by testimony aliunde what it was. *Harris in re*, 1 Sw. & Tr. 536.

³ *Barton v. Robins*, 3 Phillim. 455, n. (b).

⁴ *Plume v. Beale*, 1 P. Wms. 388.

⁵ *Allen v. M'Pherson*, 1 H. Ld. Cas. 191.

⁶ *Billinghurst v. Vickers*, 1 Phillim. 187; *Wood v. Wood*, id. 357.

⁷ 1 Wms. Exrs. 331. But the court will not expunge any portion of the instrument, but only engross in the registry such portions as are established. And where the portions failing are so connected with the remaining portions as to render them unintelligible, or excessively unequal or insensible, the whole instrument may fail with the essential portions thus rendered invalid. But see ante, Vol. I. pp. 181, 519. And where a will is lost and only a part of the contents can be proved, that portion may be admitted to probate. *Steele v. Price*, 5 B. Mon. 58. A will may become operative as a revocation of a former will, although inoperative in other respects, by reason of some extraneous considerations. *Laughton v. Atkins*, 1 Pick. 535, 548. But see *Starr v. Starr*, 2 Root, 303. The declaration of the probate court in establishing a will, that it was void so far as it conflicted with the "legal and equitable rights" of the widow, is of no force or validity whatever. *O'Docherty v. McGloin*, 25 Texas, 67.

⁸ *Curtis v. Curtis*, 3 Add. 33. See also *Shuttleworth in re*, 1 Curt. 911; *Collins in re*, 7 Notes of Cas. 278.

omitted from the probate, where the omission does not change the legal effect.⁹

3. It sometimes happens that several executors are appointed with separate functions and powers, — one for one portion of the estate, and one for another ; or one for one state, and one for another ; or one until a certain event, and then the duty to devolve upon another. In such cases, the court make one probate, and grant letters to the several executors according to their respective functions.¹⁰ And where the executor is appointed only to perform a single act or function, and by a distinct instrument the remain-

der of his estate is disposed of, the English courts of probate * 54 make * two distinct probates.¹⁰ But with us the entire will must be proved and registered as one instrument, and the letters testamentary may apportion the different duties of the executors and the administrator with the will annexed. Probate of the will cannot be granted while there is a pending controversy in regard to a codicil ; but the entire question must be settled before probate will pass, unless the controversy concerns the question of an additional co-executor, when it may, by consent, be reserved.¹¹

4. And where the will is limited in its operation to some particular portion of the testator's estate, general administration of the remainder will be granted as of an intestate estate, but generally to the person named as executor in the will.¹²

5. When a will is proved, the original is deposited in the office of the registrar of the Court of Probate, and a copy of the same, under the seal of the court, together with a certificate of it having been proved, is delivered to the executor, together with letters testamentary ; and the copy and certificate constitute what is usually called the probate, which, in strictness, should be enrolled in the registry of the court.¹³ It is requisite, of course, where the will is in a foreign language, that the probate should contain a translation of the same into English. But in *L'Fit v. L'Batt*,¹⁴ where the will was in French, and under it, in the same probate, the will was trans-

⁹ *Wartnaby in re*, 4 Notes of Cas. 476 ; 1 Rob. 423.

¹⁰ 1 Wms. Exrs. 334, 335.

¹¹ *Miller v. Sheppard*, 2 Cas. temp. Lee, 506 ; *id.* 520 ; *Fowlis v. Davidson*, 4 Notes of Cas. 149.

¹² 1 Wms. Exrs. 337 ; *Toller*, 67 ; *Brown in re*, L. R. 2 P & D. 455.

¹³ 1 Wms. Exrs. 337, 338.

¹⁴ 1 Peere Wms. 526.

lated into English, but it appeared to be falsely translated; it was objected, that the translation was part of the probate, and could not be varied except by application to the Court of Probate; the court held, that nothing but the original is part of the probate, and that the Court of Probate had no power to make a translation, and that where there was a mistranslation the Court of Chancery might determine according to what the translation ought to be.

6. It seems to be settled, that where the probate court declines to proceed in the probate of a will, or to give the executor letters testamentary, having no justifiable excuse therefor, the superior courts, by mandamus, will compel the probate court to proceed in the matter.¹⁵

*7. All papers of a testamentary character,—and this will * 55 include all papers, in whatever form, which are executed with the formalities required in the execution of wills, and which have reference to the disposition of one's estate after death,—must be proved in the probate court, and will constitute parts of the probate of the will, or the whole, as the case may be.¹⁶ And a codicil simply revoking former wills is testamentary, and must be so proved.¹⁷ And if the executor, after probate, discovers any testamentary paper, he ought, it is said, to bring it into the probate court, although it may not be indispensable to the correct understanding of the will, or may be merely in confirmation of it.¹⁸ And where the testatrix directed her executors to deliver certain sealed parcels to different persons named, without opening the parcels, it was held the executor could not with propriety do so, as he

¹⁵ *Marriot v. Marriot*, 1 Strange, 666, 672; *Rex v. Raines*, 1 Ld. Ray. 361. And it would seem, also, that where the probate court were proceeding to act in any matter, of which they clearly had no jurisdiction, a writ of prohibition might issue against it. But in the American practice such resort could be of little avail, since the question might be carried by appeal, or exceptions and writ of error, immediately, into the very court from which the writ of prohibition must issue, so that it merely involves a choice of modes of procedure, whether one course or the other is pursued. 1 Wms. Exrs. 339, 340; *Netter v. Brett*, Cro. Car. 395, *Berkley*, J.

¹⁶ 1 Wms. Exrs. 341; id. 89. This will embrace deeds of one's estate, in trust for the benefit of persons named, but not to take effect till after the decease of the grantor. In the Goods of Morgan, L. R. 1 P. & D. 214. But it will not embrace an irrevocable lease of premises to take effect in præsentia. *Robinson ex parte*, id. 384. See *Donaldson in re*, 21 W. R. 549.

¹⁷ *Brenchley v. Still*, 2 Rob. 162; *Laughton v. Atkins*, 1 Pick. 535.

¹⁸ *Weddall v. Nixon*, 17 Beavan, 160; ante, Vol. I. pp. 261-268.

would thus be unable to make an inventory of the estate upon oath, and if the parcels contained valuable property, and thus, in effect, constituted legacies, he could not consent to them, until assured of the remaining assets being sufficient to pay debts. The court, therefore, ordered the parcels opened in the presence of the registrar of the court; and as they were found to contain bank-bills of different denominations, a schedule of all, with the names of the several donees attached to the respective amounts, was made, and directed to be added as a codicil to the will, and probate decreed of the will and of all the aforesaid papers.¹⁹

¹⁹ *Pelham v. Newton*, 2 Cas. temp. Lee, 46. But where a residue is disposed of according to the trusts in a deed in which the testator had no interest or concern, and those who were interested under the deed refused to allow the deed or a copy to be taken for the purpose, the court allowed the probate of the will without their production. *Sibthorp in re*, Law Rep. 1 P. & D. 106. But where the testator, in his will, desired that instructions previously given, the same day, to the clerk of the attorney, should be carried out, the instructions being merely oral, but the clerk having made short notes of them, at the time, in the presence of the testator, it was held the notes could not be embraced in the probate. In the Goods of *Pascall*, id. 606. And where the testatrix excepted from the residuary bequest such articles of "furniture, &c., as shall be ticketed or described in a paper in my own handwriting, to show my intention regarding the same;" and when she instructed the attorney to draw the will, produced to him two lists, which she said were the paper writings she intended to refer to; which were not shown to the witnesses, at the time the will was executed, but, when a second codicil was executed, they were seen by the witnesses lying on the table, but the testatrix did not make any reference to them in their hearing, although she had just stated to the attorney, in another room, that they were the same referred to in the will, — it was held they could not be made part of the probate, by receiving oral proof of their identity, the will not having referred to them "as written documents then existing, in such terms that they are capable of being ascertained," according to the rules laid down in *Smart v. Prujean*, 6 Ves. 565, by Lord *Eldon*, and approved in *Allen v. Maddock*, 11 Moore, P. C. C. 454, and in *Von Straubenzee v. Monk*, 3 Sw. & Tr. 12. See also *Gill in re*, L. R. 2 P. & D. 6; In the Goods of *Sunderland*, L. R. 1 P. & D. 198; In the Goods of *Dallow*, id. 189; *Watkins in re*, id. 19. But where certain papers were drawn up by the testator, after the execution of his will, in conformity with references in the will, and subsequently he executed a codicil, it was held the codicil might have the effect to incorporate such papers with the will, provided it contained language sufficient for that purpose, if read as speaking at the date of the codicil. *Lady Truro in re*, L. R. 1 P. & D. 201. Where the testatrix wrote three separate lists of legacies on separate sheets of paper, the first of which was headed, "Codicil to the will of S. P.," and signed all three of the lists in the presence of the witnesses, but they attested her signature only to the first, there being nothing

8. A will merely in execution of a power requires to be proved * in the probate court, the same as any other will.²⁰ * 56 And where there are two wills affecting the question of the execution of the powers, the probate court must determine which is in force, and to what extent the later one will revoke the earlier one.²¹ The question how far the declaration of the testator, as to what particular paper shall constitute his last will, at the date of the declaration, can be held conclusive of that fact by the Court of Probate, is extensively discussed by Sir *J. P. Wilde*, in a recent case,²² and the conclusion reached, that while the intent of the testator, as to the force and extent of the operation of his last will, must be the controlling guide to all courts, it is the intent, as to the disposition of his estate, and not merely as to the particular paper or papers which shall be recognized by the probate court as the expression of his will in regard to such disposition. We have discussed this question more at length elsewhere.²³

9. A paper purporting to be a last will and testament, duly executed, but containing no more than the appointment of guardian to the testator's children, not disposing of personal estate, nor appointing an executor, is not entitled to probate.²⁴ But a testamentary paper containing a revocation of any testamentary papers is entitled to probate, although it does not purport to dispose of any property, and there is no evidence of any previous testamentary papers.²⁵

10. Some very perplexing questions arise, in the probate of wills, where it appears that the testator had destroyed a later will,

in the contents of the three to show any connection, and the first being complete in itself, the court refused probate of the other two. *Pearse in re*, L. R. 1 P. & D. 382. And where the testator produced, at the time of executing a codicil to his will, what he declared to be a copy of the will, which he expressly confirmed by the codicil, it was held that he thereby incorporated the copy into the codicil. *Mercer in re*, L. R. 2 P. & D. 91.

²⁰ *Tatnall v. Hankey*, 2 Moo. P. C. C. 342, 351; *Goldsworthy v. Crossley*, 4 Hare, 140; post, pl. 11.

²¹ *Hughes v. Turner*, 4 Hagg. 30; ante, Vol. I. pp. 270, 271.

²² *Lemage v. Goodban*, L. R. 1 P. & D. 57; *De La Saussaye in re*, 21 W. R. 549.

²³ Ante, Vol. I. 344 et seq. § 28.

²⁴ *Morton in re*, 33 Law J. n. s. Prob. 87. This is controlled by the English Stat. 12 Car. 2, c. 24.

²⁵ *Hubbard in re*, Law Rep. 1 P. & D. 53. But see *Fraser in re*, L. R. 2 P. & D. 40; *Durance in re*, id. 406.

with the alleged purpose of reviving an earlier one. In such cases there will often arise more or less difficulty in determining how far the evidence of the testator's declarations, at the time and after such destruction, are entirely reliable. There will always, in such cases, be great opportunity for interested parties to present a case to some extent colored or distorted, according to the motives and opportunities of such parties. Hence the cases upon the point are considerably numerous, but mostly bearing in the same direction, of reserve and caution on the part of the courts in allowing a former will to be thus set up, except upon the most satisfactory proof, by the declarations of the testator's intention, contemporaneously with the destruction of the later will, thus to revive an earlier one.²⁶ The testimony in such cases should always be severely scrutinized,²⁶ and, unless entirely satisfactory to the point of reviving a particular will of an earlier date, the court should declare in favor of an intestacy, which we think the more common result in this class of cases in the American practice.

11. There seems to have been some controversy in the English courts, whether the Court of Probate can grant probate of a will upon the ground merely that it may legally operate in execution of a power of appointment within the jurisdiction of the court, when otherwise it would be regarded as wholly invalid, not being executed in conformity with the law of the place of the domicile of the testator. The more recent decisions of the English Court of Probate are in favor of admitting the will to probate under such circumstances.²⁷ But some earlier cases took the view, that the Court of Probate could not look into the uses to which the will might be put, but must determine its admissibility to probate upon general consideration of its validity.²⁸ It would seem, upon general principles, that a will could not be denied probate, so long as it was suggested that it was intended to operate upon real estate or the execution of powers within the jurisdiction where probate is sought.²⁹

12. Probate may be limited in the grant, so as only to operate

²⁶ *Eckersley v. Platt*, L. R. 1 P. & D. 281; In the Goods of *Weston*, id. 633.

²⁷ In the Goods of *Hallyburton*, L. R. 1 P. & D. 90; The Goods of *Alexander*, in note to *Crookenden v. Fuller*, 1 Sw. & Tr. 454.

²⁸ *Tatnall v. Hankey*, 2 Moo. P. C. 342; *Barnes v. Vincent*, 5 id. 201; *Crookenden v. Fuller*, supra.

²⁹ *Story*, Conf. Laws, § 431 et seq.

upon certain property, in regard to which there is no question, without deciding the extent to which the will may operate,³⁰ thus leaving the question to be determined by the proper court.³¹

13. The revocation by a married woman of a former will, making an appointment of property under a marriage settlement made by her former husband in contemplation of the former marriage, is valid, and cannot be rendered inoperative by the dissent of her present husband, he having no interest in such property.³²

14. A will disposing only of property in a foreign country is not entitled to probate in the forum of any particular probate court,³³ unless it be in the place of the domicile of the testator. So it has been held, in the English Court of Probate, that a will limited to the disposition of real estate is not entitled to probate, not even where it contains a provision for the conversion of the real estate given by the will to the executor named therein into personalty.³⁴ But this rule will not apply in the American probate courts, where the probate, contrary to the rule in England, operates as a full authentication of the will, in all other courts, whether it regards real or personal property.

15. It is well settled that a will appointing an executor, and containing no disposition of personalty, is entitled to probate, whether it contain any disposition of real estate or not.³⁵ And it will make no difference in regard to the right of probate, that the executor named renounces the trust.³⁶

16. The court may order a memorandum to be indorsed on the probate, after it has issued, as to the true date on which a will was executed, if satisfied the date given in the probate is erroneous.³⁷

17. The probate court, upon the presentation for probate of a paper, not in the form wills are usually made, is compelled to receive extrinsic evidence of the purpose and intent with which the

³⁰ In the Goods of De Pradel, L. R. 1 P. & D. 454.

³¹ Paglar v. Tongue, L. R. 1 P. & D. 158 ; Noble v. Phelps, L. R. 2 P. & D. 276 ; Burdon v. Morgan, L. R. 2 P. & D. 371.

³² Hawksley v. Barrow, L. R. 1 P. & D. 147.

³³ Coode in re, L. R. 1 P. & D. 449 ; ante, § 3, n. 28.

³⁴ Barden in re, L. R. 1 P. & D. 325.

³⁵ Jordan in re, L. R. 1 P. & D. 555 ; 1 Williams Exrs. 218, 6th Eng. ed. ; O'Dwyer v. Geare, 1 Sw. & Tr. 465.

³⁶ Jordan in re, supra.

³⁷ Allchin in re, Law R. 1 P. & D. 664.

paper was created. Thus, where a paper, executed in the manner required in the execution of wills, beginning, "I hereby make a free gift to," &c., was presented for probate, the court admitted oral evidence of the intention of the deceased, and, being satisfied he intended the operation of such paper to be dependent on his death, granted probate of it as a codicil to his will.³⁸ The mere fact that a paper is executed with the formalities required in the execution of wills, independent of its contents, raises a strong presumption that it was intended to be testamentary, since it must be quite unusual to execute ordinary conveyances in that form.

18. It is not unusual in the English practice to admit a will to probate, omitting some particular portion as having been improperly obtained, as where the executrix propounded a will for probate in solemn form, and the probate was opposed, on the ground that the residuary clause in favor of the executrix was obtained by her undue influence, and the court admitted the will to probate, excluding the residuary clause on that ground.³⁹ But the English Court of Probate refused to omit any portion of the will from the probate, on the ground that it contained unfounded accusations against third parties.⁴⁰ The testatrix executed her will upon a printed form, filling in partly in ink and partly in pencil. The portion in ink overlapped some portion of that in pencil, and some portion of the latter had been rubbed out and obliterated. The words in ink were sensible, as read in connection with the printed part. The attesting witnesses did not see the writing when they attested the will. The court held the words in pencil as deliberative only, and rejected them from the probate.⁴¹ But where the will is differently expressed from the intention or direction of the testator by mere mistake, the probate court has no power to correct the mistake, either by omissions or additions in the probate.⁴²

19. The testator, being domiciled in England, but having estate

³⁸ *Robertson v. Smith*, Law R. 2 P. & D. 43. See also *Coles in re*, id. 362; *Cock v. Cooke*, L. R. 1 P. & D. 241.

³⁹ *Smith v. Atkins*, L. R. 2 P. & D. 169.

⁴⁰ *Honywood in re*, L. R. 2 P. & D. 251.

⁴¹ *Adams in re*, L. R. 2 P. & D. 367; ante, Vol. I. 499.

⁴² *Harter v. Harter*, 21 W. R. 341; L. R. 3 P. & D. 11. But it has often been held that the admission to probate only establishes it as an instrument; its effect is still open to be decided by the competent court. *Bent's Appeal*, 35 Conn. 523.

in Scotland, both real and personal, executed a trust disposition in conformity to the law of Scotland sufficient to dispose of all his estate in both countries, and subsequently executed a will disposing of all his estate in both countries. By the law of Scotland the will was not sufficient to dispose of the real estate in that country, and did not therefore supersede the trust disposition. The court granted probate of the will and trust disposition, as together containing the will of the deceased.⁴³

20. Where a will fails of probate for some incurable defect, whereby it is rendered wholly void as a will, it becomes thereby inoperative as to the widow who has elected to take under the will.⁴⁴

SECTION V.

THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION.

1. The decrees of the probate court, as to probate and letters of administration, conclusive.
2. But where the court have no jurisdiction, its decrees are void. Illustrations.
3. Discussion of the extent of equity jurisdiction over wills after probate.
4. One may be estopped, *en pais*, from procuring the revocation of a probate.
5. Courts of equity have full jurisdiction to fix the construction of wills.
- n. 28. Question in regard to a dictum of Lord *Eldon*.
6. The probate establishes the words of the will ; but not their force and effect.
7. The extent of the conclusiveness of letters of administration.
8. How far courts may look into the original will, in fixing its construction.
- n. 33. The views of V. C. *Wood* upon this question.
- 9, 10, 11. Summary of the American cases.

§ 5. 1. THE jurisdiction of the probate court being exclusive in regard to all matters pertaining to the settlement of estates of deceased persons, the decrees of such courts upon the probate of wills, and issuing letters testamentary, as well as of administration, are absolutely unimpeachable and conclusive in all other courts, both in law and equity.¹ And such a decree cannot be impeached even by showing fraud, except by a petition to the

⁴³ *Donaldson in re*, L. R. 3 P. & D. 45. s. p. In the Goods of Lord Howden, 22 W. R. 711.

⁴⁴ *Leach v. Prebster*, 35 Ind. 415.

¹ *Noell v. Wells*, 1 Sid. 359; *Allen v. Dundas*, 3 T. R. 125. See also *Griffiths v. Hamilton*, 12 Vesey, 298; 1 Wms. Exrs. 476.

court rendering the decree, who may annul or modify the same.² * It cannot, therefore, be shown, collaterally, that another person was appointed executor, or that the testator was insane, or that the will was a forgery.³ And the same rule obtains, after the probate court have granted letters of administration to a particular person, as next of kin: all other courts are precluded from trying that question, however unquestionable the proof offered.⁴ Hence it has been held in a modern case, that money paid to an executor who had obtained probate and letters testamentary upon a forged will, was a valid payment, notwithstanding the subsequent repeal of the probate and the appointment of the next of kin administrator.⁵ The reason here assigned is,

² *Archer v. Mosse*, 2 Vernon, 8; *Plume v. Beale*, 1 P. Wms. 388.

³ *Noell v. Wells*, 1 Sid. 359; 1 Wms. Exrs. 477.

⁴ *Bouchier v. Taylor*, 4 Br. P. C. 708 (Toml. ed.); *Barrs v. Jackson*, 1 Phill. C. C. 582, reversing the same case in 1 Y. & C., C. C. 585. But if it appear from the proceedings in the case that the person was illegitimate, the decree might be regarded as obtained on false suggestion, and only *prima facie* valid. *Long v. Wakeling*, 1 Beav. 400. In *Barrs v. Jackson*, 1 Phill. C. C. 582, it was held that the sentence of the ecclesiastical courts, in a suit for administration, turning on the question of who is next of kin to the intestate, is conclusive upon the Court of Chancery in a suit between the same parties for distribution. But in *Westcott v. Cady*, 5 Johns. Ch. 334, 343, *Kent*, Chancellor, said, upon the suggestion that the persons appointed were aliens, and had not qualified themselves to sue here: "The answer to this is, that letters of administration under the seal of the Court of Probate of this state are produced, and I am bound to presume *omnia rite acta*, and to give full credit to the judicial acts of a competent jurisdiction." The question is somewhat discussed in a late case in the English Court of Probate, *Spencer v. Williams*, L. R. 2 P. & D. 230, and the learned judge, Lord *Penzance*, came to the conclusion, that if parties litigate a question in a court of competent jurisdiction, and a final decision is given thereon, such parties, or those claiming through them, cannot afterwards reopen the same question in another court. In addition to cases already cited in this note, the counsel here referred to *Blackham's Case*, 1 Salk. 290; *Thomas v. Ketteriche*, 1 Ves. Sen. 333. Where a will is contested between the executor and some of the next of kin, all the other next of kin will be bound by the decision, provided they had knowledge of the suit, and opportunity to intervene. But if the suit is compromised, and a decree passed by consent, it will only bind those agreeing to the compromise. *Wytcherley v. Andrews*, L. R. 2 P. & D. 327. See also *Newell v. Weeks*, 2 Phillim. 224; *Colvin v. Fraser*, 2 Hagg. Eccl. 266; *Ratcliffe v. Barnes*, 2 Sw. & Tr. 486. See also *Morrell v. Dickey*, 1 Johns. Ch. 153; *Pritchard v. Hicks*, 1 Paige, 270; *Colton v. Ross*, 2 Paige, 396; *Bogardus v. Clark*, 4 Paige, 623; *Burger v. Hill*, 1 Bradf. Sur. Rep. 360.

⁵ *Allen v. Dundas*, 3 T. R. 125. But where one under an assumed name

that the debtor could not have defended against the suit of such executor, and he was not therefore obliged to wait for a suit, but might pay his debt to save costs. So where a probate was revoked, because the witnesses were incompetent, it was held, that the acts of the executor, before the recall, were valid, and that he might be cited to render his account.⁶

2. But the rule would be otherwise where the court had no jurisdiction of the case; as if probate and letters testamentary should be granted of one's will, he being still alive. All the acts of such executor would be void, and an action brought by him

* might be defeated by showing the testator still living.⁷ * 58

And there are numerous cases in the American books, where the jurisdiction of the probate courts were dependent upon the place of domicile of the decedent at the time of his decease;⁸ where their decrees were held void; and also upon the ground that there were no effects of a non-resident decedent within the state, at the time of his decease;⁹ or, upon numerous grounds, going to the jurisdiction of the court.¹⁰ And the fact that the Court of Probate, in giving judgment, passed upon the question of jurisdiction, does not exclude any other court from inquiring into the truth of the same facts, collaterally, and declaring the judgment of the Court of Probate void upon the ground of want of jurisdiction. Presumptions in favor of the jurisdiction of probate courts do not rest upon the same ground as those which are made in reference to superior courts of general jurisdiction, the latter being held conclusive, and the former only *primâ facie*, because of the special and

obtained probate of a forged will, and thereby obtained the transfer and payment of stocks, it was held not to afford protection to those making the transfer and payments. They should have seen to it that the person was the one named as executor. *Jolliffe ex parte*, 8 Beav. 168.

⁶ *Appeal of Peebles*, 15 Serg. & R. 39, 42.

⁷ *Allen v. Dundas*, 3 T. R. 125; *Tilghman*, Ch. J., in *Peebles' Appeal*, 15 Serg. & R. 42; *Moore v. Tanner*, 5 Monr. 42; *Payne's Will*, 4 id. 422; *King v. Bullock*, 9 Dana, 41; *Marshall*, Ch. J., in *Griffith v. Frazier*, 8 Cranch, 9, 24. This question is extensively discussed by Mr. Justice *Dewey*, in *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, and the authorities commented upon.

⁸ *Cutts v. Haskins*, 9 Mass. 543; *Wales v. Willard*, 2 id. 120; *Holyoke v. Haskins*, 9 Pick. 259.

⁹ *Crosby v. Leavitt*, 4 Allen, 410.

¹⁰ *Holyoke v. Haskins*, 5 Pick. 20; *Sumner v. Parker*, 7 Mass. 79, 82; *Smith v. Rice*, 11 Mass. 507; *Sigourney v. Sibley*, 21 Pick. 101.

limited extent of the jurisdiction. Thus in *Smith v. Rice*,¹¹ it was said by the court, "the proceedings in the probate courts are not according to the course of the common law ; their jurisdiction is special and limited."

3. Where the court has jurisdiction of the subject-matter, the probate is conclusive in every particular. As where it is granted of the "will and codicil," this is conclusive that the will was in that form.¹² And it is not competent for a court of equity to expunge a legacy on the ground that it was a forged interlineation.¹³

But it has been decided in cases where one obtains a legacy * 59 by *inserting his own name in the will instead of that of the intended legatee, he may be declared a trustee.¹⁴ It was also once held, that where counsel have obtained an illegal advantage over the testator through his ignorance of the law, not giving him such information as they were in good faith bound to do, that the amount so secured may be declared to be held in trust for the next of kin.¹⁵ But it seems very questionable how far this doctrine could safely be carried at the present day.¹⁶ The very purpose of requiring wills to be in writing would be wholly defeated if courts of equity were allowed to ingraft upon their provisions such parol trusts as seemed probably to have existed in the mind of the testator.¹⁷ And the more recent cases wherein this question has been

¹¹ 11 Mass. 507.

¹² *Baillie v. Butterfield*, 1 Cox, 392.

¹³ *Plume v. Beal*, 1 P. Wms. 388. Lord *Cowper* here said the executor might have proved the will with a particular reservation as to this legacy. But that, we apprehend, would not be allowed in our courts of probate. See also *Townsend v. Townsend*, 4 Coldw. 70.

¹⁴ *Marriot v. Marriot*, 1 Strange, 666.

¹⁵ *Segrave v. Kirwan*, 1 Beat. 157 ; *Hindson v. Weatherill*, 1 Sm. & Giff. 604 ; reversed on the facts, 5 DeG., M. & G. 301 ; 1 Wms. Exrs. 479.

¹⁶ A devise or bequest is ordinarily a mere gratuity. If the law requires the evidence of writing to create a trust, it seems little less, in thus changing the legal effect of the provisions of the will, than reforming the will itself. If such a course were generally countenanced, it would enable any party to retry and recast the probate of the will, at any time, in a court of equity, upon such proof as might have survived.

¹⁷ 9 Simons, 539. The exception here made is based upon the opinion of Lord *Hardwicke*, in *Barnesly v. Powel*, 1 Vesey, Sen. 119, 284, 287. In this latter case the decree goes upon the ground that the probate itself, not the will, had been obtained by fraud. And in such cases it is proper always, as was here done by Lord *Hardwicke*, to enjoin the party thus guilty of fraud, in the very act of obtaining the judgment, from making any use of it. And the defendant was, in addition, here required to consent to a revocation of

considered, have virtually denied all jurisdiction in the Court of Chancery to re-examine the grounds upon which the probate of a will is granted. Thus, in *Gingell v. Horne*, it is said a court of equity have no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it was fraudulently obtained.¹⁷ And in *Allen v. Macpherson*¹⁸ the question and the cases are carefully reviewed by Lord *Lyndhurst*, Chancellor, and the conclusion reached, that a court of equity have no jurisdiction to set aside the probate of a codicil revoking legacies given to the plaintiff, upon the ground that the testator had been induced to * execute the codicil solely upon * 60 the ground of certain false and fraudulent representations which had been made to him against the plaintiff's character. His lordship here reversed the decision of the Master of the Rolls ;¹⁹ and the decree of the Chancellor was affirmed in the House of Lords.²⁰ It is apparent from the discussion in this last case, that the profession in England have regarded the case of *Kerrich v. Bransby*²¹ as an authority for the rule that a court of equity have no jurisdiction either to set aside the probate of a will, on the ground of fraud in obtaining the will, or to declare a legatee under the same a trustee for the next of kin, or for a particular person, where either had been defrauded by the legatee in obtaining such bequest. Lord *Lyndhurst*, in the House of Lords, when the case of *Allen v. Macpherson* was under consideration, said of the case of *Marriot v. Marriot*,²² that he thought the cases in which the House of Lords had declared a legatee or executor a trustee for another in regard to his legacy, would be confined to questions of construction ; or where the party was named as trustee ; or where the Court of Probate could afford no adequate remedy ; or where one name is fraudulently inserted for another. In such cases, unless the will were proved, and the fictitious legatee were held a trustee for the real legatee, the latter would lose

the probate, — p. 288. The same distinction is recognized by Lord *Apsley*, Chancellor, in *Meadows v. Duchess of Kingston*, Amb. 762. This is in fact the only possible ground upon which a court of equity could presume to interfere in the matter of the probate of a will, the jurisdiction of which is exclusively in another court. See *Broderick's Will*, 21 Wallace, 503, where the same views are maintained.

¹⁸ 1 Phill. C. C. 133.

¹⁹ 5 Beavan, 469.

²¹ 7 Br. P. Cas. 437.

²⁰ 1 Ho. Lds. Cas. 191.

²² Ante, n. 14.

all benefit under the will. The same rule prevails in the American courts as to the conclusive effect of the probate, and the want of jurisdiction in the courts of equity to limit and control the same.²³

4. A party may be enjoined, in a court of equity, from proceeding to revoke the probate of a will after having acted under the same in such a manner as to have his acts operate in the nature of an estoppel en pais.²⁴

5. The construction of a will, and its force and effect, is a proper question to be determined by a court of equity.²⁵ Hence, where a will is regularly proved before the probate court, a * 61 court of equity * may feel compelled to give it, or portions of it, such construction as to render it practically inoperative.²⁶ In one case,²⁷ Lord *Eldon*, Chancellor, is reported to have said, on a motion for an injunction and receiver, on the ground that the executor had no lawful authority over the estate under the will (it having been made by a British subject domiciled in a foreign country, in conformity with the English law, but not with the laws of the place of domicile), "I have no authority to say that an instrument of which the Ecclesiastical Court has granted probate is not a will. . . . I do not know on what ground the Ecclesiastical Court has granted probate. It is enough for me, that having granted probate, I am concluded from examining the question whether there is a will or not, or whether Dr. Curling is executor or not. . . . I should be perfectly at liberty then to say, that this instrument is a will, so far as it appoints Curling executor, but that it has no other operation," making him trustee for the next of kin, as to all the effects coming into his hands.²⁸

²³ *Gaines v. Chew*, 2 How. U. S. 619; *Clark v. Fisher*, 1 Paige, 171; *Colton v. Ross*, 2 Paige, 396.

²⁴ *Sheffield v. Buckinghamshire*, 1 Atk. 628; *Gascoyne v. Chandler*, 3 Swanst. 418, note.

²⁵ Ante, Vol. I. pp. 492-495.

²⁶ *Gawler v. Standerwick*, 2 Cox, 16; *Walsh v. Gladstone*, 13 Sim. 261; *Campbell v. Earl of Radnor*, 1 Br. C. C. 271.

²⁷ *Thornton v. Curling*, 8 Sim. 310.

²⁸ This dictum of Lord *Eldon* is quoted by Mr. Justice *Williams*, 1 Exrs. 486, as being sound law. But it seems questionable, and it is to be remembered that his lordship did not absolutely decide the point. He threw out this argument in overruling the motion. And as the only question raised in regard to the motion was whether the property passed under a will executed

6. The effect of the probate is to establish the words of the probate as the legal will of the deceased. How far these words extend, what is their precise scope and operation, will unquestionably remain to be considered and determined by the tribunals before which any party may claim a right under the instrument. Thus a will, executed under a power, being admitted to probate, it is thereby conclusively established that the will contained the effective words of the probate, and that it was duly executed according to the law governing it. But how far it is a compliance * with the requirements of the power, and whether * 62 operative under it, must be settled by the tribunals before which these questions shall be raised.²⁹

7. But letters of administration, although conclusive within their direct scope and operation, as matter of evidence, and not by way of estoppel in pleading,³⁰ are not conclusive of any question of fact incidentally implied by the granting of such letters, on the death of the testator,³¹ especially where such fact arises col-

by a testator domiciled in France, not according to the law of that country, but to that of England, the testator's domicile of origin, it would seem that if the instrument was valid for the purpose of appointing an executor, it must be equally valid for the purpose of carrying the bequests contained in it into effect. The instrument was either void, for informality, or, if valid, it was valid in toto. The probate therefore did settle the question of the will being executed in conformity with the law by which it was legally governed, — i.e., the law of the place of the domicile of the testator, as to personalty and the appointment of an executor.

²⁹ 1 Wms. Exrs. 487; *Hume v. Rundell*, Madd. & Geld. 331, 339; *Rich v. Cockell*, 9 Vesey, 376; *Morgan v. Annis*, 3 DeG. & Sm. 461. In this latter case, *Knight Bruce*, V. C., is reported to have said, he had no doubt a court of equity had jurisdiction to decide on the validity of the execution of a testamentary power over personalty, as with reference to the donee's state of mind at the time of the alleged execution. This may be so, but we should expect an American court to hold that question conclusively settled by the probate. But the general decree of the probate court, admitting to probate a paper as the last will and testament of the decedent, will have no effect in legalizing bequests claimed to be void. *Burt's Appeal*, 35 Conn. 523.

³⁰ *Graysbrook v. Fox*, Plowden, 275, 282; *Mercella's Case*, 9 Co. 24 a, 31 a; *Hensloe's Case*, 9 Co. 36 b, 41 a.

³¹ *Thompson v. Donaldson*, 3 Esp. N. P. C. 63; *Moons v. De Bernales*, 1 Russ. C. C. 301. Thus it has been held, that the granting of administration to one as next of kin will operate as a bar to a bill in equity filed against such administrator claiming an interest in the estate as distributee. *Caujolle v. Ferrie*, 5 Blatchf. C. C. 225.

laterally in a case to which the personal representative is not a party. So far as the particular suit is concerned, where the personal representative is a party, the letters testamentary or of administration are treated as conclusive evidence of all facts implied in their grant, especially of the decease of the testator or intestate.³²

8. It is a question of considerable interest how far those courts before which the probate of wills may come for construction are at liberty to look into the original will, in order to gather the true import of the same from the manner in which the instrument is written or punctuated. It is certain that in very many cases this has been done by eminent equity judges, even where probate of the will had been granted in fac-simile.³³ In one case, so * 63 * eminent a judge as the present Lord Justice *Knight Bruce*,³⁴ desired it to be understood that he "had sent for and examined the original will, and had been influenced by it in [his] construction." And in *Shea v. Boschetti*,³⁵ the Master of the Rolls, Sir J. *Romilly*, held that whether the Court of Probate grants a fac-simile probate or not, the Court of Chancery is bound to look at any thing in the original will which may aid it in coming to a correct conclusion as to the construction to be put upon its contents. But Lord *Cranworth*, Chancellor, in *Gann v. Gregory*,³⁶ disapproved of this practice in very decided terms, and said that although Lord *Eldon* had done it under special circumstances, it could not be justified as a general practice. And *Kindersley*, V. C., in *Taylor v. Richardson*,³⁷ said the Court of Chancery was bound to look at the will as presented upon the probate. And Mr. Justice *Williams*,³⁸ as the result of all the cases, fully concurs in the opinion of Vice-Chancellor *Wood* in *Oppenheim v. Henry*,³⁸ that if

³² *Newman, Admr. v. Jenkins*, 10 Pick. 515.

³³ *Havergal v. Harrison*, 7 Beavan, 49; *Oppenheim v. Henry*, 9 Hare, 802, and n. b., where Vice-Chancellor *Wood* said, that if he were to look into the original will to see if "on" were not written "or," he "did not know where such a practice might stop. It might be said that a whole line was left out, which the court was to call for the original will for the purpose of inserting. It was different from the case of a question arising on the punctuation of the will, or on the introduction of a capital letter or other mark indicating where a sentence or clause was intended to begin, and which might affect its sense."

³⁴ *Compton v. Bloxham*, 2 Coll. C. C. 201.

³⁵ 18 Beav. 321.

³⁶ 3 DeG., M. & G. 777.

³⁷ 2 Drewry, 16.

³⁸ 1 Exrs. 491, 492.

the fac-simile probate does not present the will truly, application should be made to the Court of Probate for an amendment. This would seem to be the correct practice, unless the will contains something which it is not practicable to transfer to the probate. But in those courts where no registered copy of the will is made, but the original will remains on file as the only record of its contents, we do not see any objection to an inspection by any other court when its construction comes in question.

9. The decisions in the American courts are considerably numerous, upon the conclusive effect of the probate, or refusal of probate of a will in the probate court. As a general rule it must be very obvious that such a decree will be conclusive, and will be treated as an adjudication in rem. This is declared more or less directly and explicitly, in the following cases.³⁹

³⁹ *Tibbatts v. Berry*, 10 B. Mon. 473; *Herrington v. Herrington*, Walker, 322; *Moore v. Tanner*, 5 Monr. 42; *Brown v. Wood*, 17 Mass. 68, 72; *Barney v. Chittenden*, 2 Green (Iowa), 165; *Jackson v. Robinson*, 4 Wend. 436; *Fortune v. Buck*, 23 Conn. 1; *King v. Bullock*, 9 Dana, 41; *Campbell v. Logan*, 2 Bradf. Sur. Rep. 90; *Thompson v. Thompson*, 9 Penn. St. 234. The same rule prevails in most of the states, in regard to devises of real estate, as to legacies of personalty. *Parker v. Parker*, 11 Cush. 519. The will is not admissible as evidence until proved in the probate court, and with that it is conclusive, until the probate is set aside by some proceeding, either by petition or appeal brought to operate directly upon that point. *Dublin v. Chadbourn*, 16 Mass. 433; *Shumway v. Holbrook*, 1 Pick. 114; *Laughton v. Atkins*, id. 535, 549; *Rogers v. Stevens*, 8 Ind. 464; *Wilkinson v. Leland*, 2 Pet. U. S. 627, 655; *Fotherree v. Lawrence*, 30 Miss. 416; *Swazey v. Blackman*, 8 Ham. 5. But see *Hays v. Harden*, 6 Penn. St. 409; *Rowland v. Evans*, 6 Penn. St. 435. The rule is different as to real estate in England and in some of the American states. *Bagwell v. Elliott*, 2 Rand. 190. And it has been held that the decree of the probate court, being a proceeding in rem, must be treated as conclusive as to infants and persons under disability at the time. *Redmond v. Collins*, 4 Dev. 430. Proof of the will in the probate court is only conclusive as to lands within the state. *Robertson v. Barbour*, 6 Monr. 523; *Sneed v. Ewing*, 5 J. J. Marshall, 460.

Proof before the register of the Court of Probate, when he acts in the place of the judge, is of the same validity as if made before the judge. *Loy v. Kennedy*, 1 Watts & Serg. 396. *Holliday v. Ward*, 19 Penn. St. 485; *Hilliard v. Binford*, 10 Ala. 977. But the mere certificate of the register or clerk to the fact of the will having been admitted to probate is not the proper evidence of the probate. That should be shown by a copy of the judgment of the court establishing the will. *Creasy v. Alverson*, 43 Mo. 13.

The proceeding before the probate court for establishing a will, being regarded in the nature of a proceeding in rem, all persons interested in the ques-

* 64 * 10. But this of course will not preclude the proper court, having jurisdiction of the question, from revising the decree of the probate court, allowing or rejecting a will, upon a petition from any party interested under the will, or in opposition to it, as the case may be. And where there is no express statutory provision giving jurisdiction to some superior court, in petitions for rehearing or revision of the decrees of the probate courts, it pertains to those courts, as one of the necessary incidental powers of all tribunals, not infallible, to entertain petitions, under reasonable conditions and for sufficient grounds alleged therein, for the purpose of revising or reconsidering their own decrees.⁴⁰

11. But where the will was admitted to probate and letters testamentary issued and no appeal taken, the accounts of the
* 65 executor * settled and he finally discharged by the court, it was held the court could not then receive evidence of republication after a certain date, in order to bring real estate acquired by the testator after the date of the will within its operation.⁴¹

CHAPTER I a.

THE POWERS AND MODE OF PROCEDURE IN COURTS OF PROBATE.

1. This chapter attempts to define those matters not embraced in others.
2. Discovery in courts of probate is made *viva voce*.
3. The probate court may direct the procedure.
4. Discovery proper, where property or will lost or concealed.
5. Party may be cited before probate court, merely as witness, to facts important to be known to the party, in governing his procedure.
6. Cannot decree forfeiture under will.
7. Probate court cannot, ordinarily, decree surrender, as against strangers.

tion have a right to become parties at any time before the final decision. *Sawyer v. Dozier*, 5 Iredell, Law, 97; *Patton v. Allison*, 7 Humph. 320. See also, as bearing upon the general question of the conclusiveness of the decrees of the courts of probate, *McFarland v. Stone*, 17 Vt. 165; *Thompson v. Thompson*, 9 Penn. St. 234; *Tebbets v. Tilton*, 4 Foster, 120; *Wilson v. Edmonds*, id. 517; *Merrill v. Harris*, 6 id. 142; *Clark v. Pishon*, 31 Me. 503; *Patten v. Tallman*, 27 Me. 17.

⁴⁰ *Campbell v. Logan*, 2 Bradf. Sur. Rep. 90; *Walworth*, Chancellor, in *Muir v. The Orphan House*, 3 Barb. Ch. 477, 481.

⁴¹ *Shields' Appeal*, 20 Penn. St. 291.

§ 5 a. 1. THE powers of courts of probate may be defined, in a general way, as extending to every thing pertaining to the settlement of estates of persons deceased. The detail of those powers, and the duties therefrom resulting, would carry us over much of the same ground occupied in the other portions of the work. We shall therefore only define such powers and modes of procedure here as do not find an appropriate place elsewhere.

2. The power to compel discovery is regarded as a necessary part of the machinery incident to the accomplishment of the duties of courts of probate; and is provided for, more or less in detail, in the statutes of most of the states. The mode of procedure in obtaining this discovery in courts of probate is altogether *viva voce*; and therefore more convenient, and commonly much more effective, than that pursued in courts of equity.¹

3. The probate court has full jurisdiction, in the first instance certainly, to prescribe the course and mode of inquiry; and may direct what interrogatories may be put, and when they are sufficiently answered, and to what extent the person cited is excused from giving answer to any inquiry proposed by the opposite party. And no right of appeal, ordinarily, exists in such cases until the whole proceeding is finished in the probate court.²

4. It will not be practicable to define the extent of discovery which may be enforced in probate courts. That will depend largely upon the statutes of the different states. One of the more common questions requiring discovery in the probate court is, where there is an alleged embezzlement or concealment of the property of the decedent.³ Where there is alleged to be a will not produced, whether the same be lost or concealed, it will, ordinarily, form the proper occasion for a discovery before the probate court; and there are many others, to which we may allude hereafter.

5. In the practice of the English Court of Probate, where the party desires to establish a will, and for that purpose to bring all the next of kin before the court, some of whom are unknown to him, the court, under the statute,⁴ will issue a subpoena to compel the attendance of such persons as are alleged to have knowledge of the members of the family and of the other next of kin.⁵

¹ *Laws in re*, L. R. 2 P. & D. 458 ² *Kimball, Exr. v. Kimball*, 19 Vt. 579.

³ *Kimball v. Kimball*, *supra*; *Cannon v. Crook*, 32 Md. 482; *ante*, p. 13, n. 5.

⁴ 20 & 21 Vict. c. 77, § 24. ⁵ *Shepherd v. Beetham*, L. R. 2 P. & D. 384.

6. A probate court has no power to decree a forfeiture under the conditions of a will, that being no part of the proceedings for the settlement of the estate.⁶

7. Where the probate court has jurisdiction, under the statutes of the state, to summon persons before them who are accused of embezzling the estate, or in any mode withholding it from the personal representative, and compelling discovery, it might seem, as a necessary consequence, that it might decree a surrender of the same, and enforce such decree by process of contempt. But most of the statutes known to us do not seem to contemplate any further proceedings in the probate court, after the discovery.

⁶ *Treat v. Treat*, 35 Conn. 210.

* CHAPTER II.

THE APPOINTMENT OF, AND WHO MAY BE EXECUTORS.

1. The term "executor" originally embraced what are now called administrators.
- n. 1. History of the law as to settlement of intestate estates.
2. The nomination of an executor alone constitutes a will, and requires probate.
3. All persons may be executors, unless specially disqualified. Corporations. Co-partnerships.
4. An alien may be executor, but he must generally be resident.
5. Infants may be named executors, but cannot act except by others.
6. Married women may be executors, but can only act concurrently with their husbands.
7. But they may execute powers without such concurrent action.
8. Crime, immorality, or vicious habits, no absolute disqualification. Probate court may remove.
9. The executor must derive his appointment from the will.
10. No particular form required in appointing an executor.
11. Advisers and coadjutors should join in office of executor.
12. Executors may be appointed by power in will.
13. The American law corresponds with the English in these respects.
14. Different executors may be appointed with distinct duties.
15. Executorship in different countries may be given to different persons.
16. Executorship may be made dependent upon conditions.
17. The executor of an executor cannot administer in America.
- n. 22. Cases stated which do not amount to the appointment of an executor.
18. The will may make any person executor named by the probate court.
19. The courts of equity, in England, appoint receivers to administer the assets, where the executor becomes bankrupt.
20. But where the probate courts possess power to give redress, the American courts of equity do not interfere.
21. The control of trustees by courts of equity.
 - (1.) One of two joint trustees cannot perform the trust.
 - (2.) May remove disabled trustee, or declare trust single.
 - (3.) Trust cannot be parcelled out, but different trustees may perform distinct trusts.
 - (4.) Lunatic trustee may be removed, on notice to committee.
 - (5.) But the Court of Chancery cannot, ordinarily, remove an executor.
22. The duties of a trustee are distinct from those of the executor.
23. But where such duties are devolved upon the executor, he will be treated as trustee in respect of them.
24. But the English courts treat all such trusts as pertaining to the office of executor.
- 25, 26, 27. What trusts may be executed by the executor.
28. A will defining the duties of trustees does not make them executors.
29. Executor must be appointed by will to settle estate generally, or, at all events, some portion of it.
30. Where an executor is required by will to invest legacy and neglects to do so, he will be liable for interest.

§ 6. 1. AT common law the term "executor" originally embraced what is now called an administrator, or executor constitutus, as * 67 well as one appointed by the testator, or executor testamentarius; but at present the term is limited to the latter exclusively.¹

2. The mere nomination of an executor, without making any disposition of one's estate, or giving any other directions whatever, will constitute a will, and render it necessary that the instrument be established in the probate court.²

3. All persons may be made executors, unless specially disqualified.³ It was once doubted, but was subsequently ruled, that a corporation aggregate may be named executor; but as their corporate functions do not embrace such duties, they name persons to take the office of administrator with the will annexed.⁴ So

¹ 1 Wms. Exrs. 197. It is scarcely necessary to mention, as matter of history, the thing is so well understood, and is of so little practical importance at the present day, that in England, originally, the King, as *parens patriæ*, was accustomed to take possession of the goods of persons deceased intestate, to the intent that they should be preserved and applied for the burial of the deceased, the payment of his debts, and for the benefit of his wife and children, and in default thereof, those of his blood. *Hensloe's Case*, 9 Co. 36 b. This prerogative seems originally to have been administered in the county courts, but was subsequently committed to the Ordinary, or bishop of the diocese, as a trust to dispose of the estate for pious uses. *Dyke v. Walford*, 5 Moore's P. C. C. 434; s. c. 6 Notes of Cas. 309. The bishop was at first, after deducting the *partes rationabiles* of the wife and children (Vol. I., pp. 2, 3), accustomed to distribute the remainder of the estate among the poor, without even the payment of debts and charges. 1 Wms. Exrs. 351. By the Stat. of Westm. 2 (13 Edw. 1, ch. 19), the Ordinary is required to pay the debts of the deceased, the same as executors were required to do. 2 Black. Comm. 495. And in *Snelling's Case*, 5 Co. 82 b, it is said that this duty was of common-law obligation, and that the statute was only in affirmation of the common law. But unless the deceased directed by will the disposition of his estate, the Ordinary still continued to make such disposition of it, as he supposed the deceased would, or should have done, for the good of his own soul, until the 31 Edw. 3, st. 1, ch. 11, which provides that in all cases of intestacy the Ordinary shall depute the next of kin to administer the estate, who may have an action for all debts due the deceased, which statute is the foundation of the present law in regard to settling intestate estates, and of the surviving of rights of action to personal representatives. 2 Black. Comm. 495; 1 Wms. Exrs. 352, 353.

² Godolph. pt. 2, ch. 5, § 1. But a paper appointing a guardian is not entitled to probate. Ante, § 4, pl. 9. ³ Swinb. pt. 5, § 1, pl. 1.

⁴ 1 Wms. Exrs. 198, 199. The same rule still prevails in England. *Darke*

a corporation sole may act as executor. And a copartnership may * be named executor, but this is held to extend * 68 only to the persons at that time members.⁵

4. It is said an alien friend may act as executor, but according to the requirements of most of the American states, an executor or administrator must be, and remain, an inhabitant of the state where he receives his appointment;⁶ but this is not required in all the states.

5. Infants may be named executors, but cannot, generally, act as such, until they arrive at full age. But if there be executors named also, who are of full age, there will be no necessity of the appointment of an administrator with the will annexed, as the adults may act till the infant comes of age.⁷ And if a married woman be named executor, not being of full age, her husband being of age and consenting, it is the same as if she was of full age.⁸

6. It seems to be clearly settled in the English law, that a married woman may become executrix, but she cannot act without the consent of her husband; nor is she compellable to act by the agency of her husband. If she is appointed while married, her husband must act concurrently with her; and if she marries while she is executrix, her husband thereby becomes co-executor with her.⁹

in re, 1 Sw. & Tr. 516. But it has been denied, in this country, that a corporation can either become executor, or name one to execute the duties as administrator with the will annexed, even where such corporation is named in the will as executor and universal legatee. *Georgetown College v. Browne*, 34 Md. 450. And, as the corporation clearly cannot itself perform the duty, it seems more proper for the probate court to name one for the office than for the corporation to do it. But the rule is otherwise in some states. *Matter of Kirkpatrick*, 22 N. J. Eq. 463.

⁵ *Fernie in re*, 6 Notes of Cas. 657.

⁶ *Sarkie's Appeal*, 2 Penn. St. 157; *Ellmaker's Estate*, 4 Watts, 34; *McClellan's Appeal*, 16 Penn. St. 110; *Ritchie v. McAuslin*, 1 Hayw. 220; *Fish's note*, 1 Wms. Exrs. 200.

⁷ Mass. Gen. Stat. ch. 93, § 7, has re-enacted this provision of the common law. *Twisden, J.*, in *Foxwist v. Tremain*, 1 Mod. 47; s. c. id. 72. It was here held that infant executors who joined as plaintiffs with another of full age need not appear by guardian, although it might be otherwise if they appeared as defendants.

⁸ 1 Wms. Exrs. 202.

⁹ *Barber v. Bush*, 7 Mass. 510; *Edmundson v. Roberts*, 1 How. (Miss.) 322. See also *Lindsay v. Lindsay*, 1 Desaus. 150. The wife may be restrained from obtaining the assets of the testator because her husband is abroad and

7. But it is clear that a married woman may execute a naked power, without the concurrence or consent of her husband; for the reason, it is said, that no injury can accrue to the husband thereby, and great detriment might accrue to others by the denial of
 * 69 the * power to act on her part.¹⁰ And the same rule obtains in the American states.¹¹

8. One is not disqualified from acting as executor on account of crime. He may act in that capacity, although attainted or outlawed, under the English law.¹² Nor does immorality or habitual drunkenness, by the American practice, disqualify one to act in that office.¹³ But in most of the states the courts of probate have, by statute, a discretionary power to remove executors "when insane, or otherwise incapable of discharging the trust," or, in some of the states, when "evidently unsuitable therefor."¹⁴ And under this provision it was held, that the probate court had a discretion to remove one, on the ground that the prosecution of his individual claims on the estate would conflict with his duties as executor, and that the decree of the probate court, in such case, unappealed from, was conclusive in a collateral suit.¹⁵

not amenable to the process of the court. *Taylor v. Allen*, 2 Atk. 213. See also *Stewart*, appellant, 56 Me. 300.

¹⁰ *Reeve*, Dom. Relat. 120; *Peacock v. Monk*, 2 Vesey, Sen. 191.

¹¹ *Ela v. Card*, 2 N. H. 175; *Tyree v. Williams*, 3 Bibb, 365, 368; *Floyd v. Massie*, 4 Bibb, 427, 430; *Hoover v. The Samaritan Society*, 4 Wharton, 445.

¹² *Killigrew v. Killigrew*, 1 Vernon, 184; *Carson's Case*, Cro. Car. 8. A person appointed executor, and after the testator's death convicted of felony, is not thereby disqualified absolutely from acting as such. *Smethurst v. Tomlin*, 2 Sw. & Tr. 143, 147; s. c. 7 Jur. N. s. 763.

¹³ *Berry v. Hamilton*, 12 B. Mon. 191; *Sill v. M'Knight*, 7 W. & S. 244.

¹⁴ Mass. Gen. Stat. ch. 101, § 2. Poverty is not in itself a disqualification of one from acting as executor. *Wilkins v. Harriss*, 1 Whinst. Eq. 41. There must be some misconduct or maladministration for which he cannot answer by reason of his insolvency, and no adequate security. *Ib.*

¹⁵ *Thayer v. Homer*, 11 Met. 104. By the civil and canon law there was a long roll of disqualifications under this head: traitors, heretics, apostates, felons, outlawed persons, persons excommunicate, bastards born of adultery, or incest, etc. Swinb. pt. 5, §§ 2, 3, 4, 5, 6, 7. Common libellers, manifest usurers, and Popish recusants are also here named as incompetent for the office of executor. *Id.* §§ 10, 11, 13. These disqualifications now sound ludicrous, in some respects; and many of them would not be easy of application, where large portions of the community, and some in authority, perhaps, are either habitually guilty of some of the evil practices interdicted, or else ambitious to become or to be reputed so. See *Sill v. M'Knight*, 7 W. & S. 244;

* 9. An executor can only derive his appointment from * 70 the will, for if no person be designated by the will to perform the trusts under it, they must by the probate court be committed to an administrator with the will annexed.¹⁶

10. There is no particular form requisite for the appointment of an executor, much less any necessity of designating the appointee by that particular name. Any language whereby the testator in his will, or any codicil thereto, indicates the desire that any person should discharge the duties pertaining to that office, will be sufficient for the purpose. Thus, the expressed wish that A. B. shall have his goods, pay his debts, and dispose of them at his pleasure, or any equivalent words, have been held sufficient to constitute one executor.¹⁷ And the mere direction that certain persons shall pay debts, funeral charges, and the expense of proving the will, has been held sufficient to constitute such persons executors.¹⁸ So the leaving of the testator's goods to one by name or description will constitute him executor.¹⁹ And, as Lord *Hardwicke* expressed it, one made universal heir has the right to go to the Ecclesiastical Court for probate.²⁰ So, the appointment of persons to receive the

Taggart's Petition, 1 Ash. 321; Cohen's Appeal, 2 Watts, 175; Webb v. Dietrich, 7 W. & S. 401. And in Louisiana, Succession of Vogel v. Vogel, 20 La. Ann. 81, it was held that one who refused to take the oath of allegiance to the United States, in the form prescribed, must be regarded as having vacated the office of executor. In New Jersey, where the Court of Chancery exercises much the same jurisdiction in regard to the settlement of estates as is done in England, it was recently held, that the Court of Probate alone had the power to remove an executor. But where the executor is also trustee, and his functions as trustee are separable from those of executor, the Court of Chancery may remove him as trustee, but will not interfere with his rights and duties as executor. Under the Connecticut statutes the probate court may remove an executor or administrator for neglecting to perform the duties. Treat's Appeal from Probate, 40 Conn. 288. But chancery will, in proper cases, enjoin the executor from further exercising his functions, and appoint a receiver to conclude the administration under the direction of the court, and direct the assets delivered to him for that purpose. Leddell v. Starr, 4 C. E. Green, 159. But this is not the ordinary function of a court of chancery in most of the other American states. See post, § 12, pl. 4, n. 7.

¹⁶ 1 Wms. Exrs. 209, n. (a).

¹⁷ Henfrey v. Henfrey, 4 Moo. P. C. C. 33; Brightman v. Keighley, Cro. Eliz. 43; Pemberton v. Cony, id. 164. See also Stone v. Brown, 16 Texas, 425.

¹⁸ Fry in re, 1 Hagg. 80; Montgomery in re, 5 Notes of Cases, 99, 101.

¹⁹ Grant v. Leslie, 3 Phillim. 116; Glasson, ex parte, 22 W. R. 845.

²⁰ Androvin v. Poilblanc, 3 Atk. 301.

property and pay the legacies, constitutes them executors.²¹ If the testator make one executor, upon condition that another will not accept, or upon the supposition that other persons are dead, * 71 who * prove to be alive, this will be an appointment of such others by implication.²²

11. According to the practice in England, it is not uncommon for the testator to name another person besides the one he intends to act as executor, to assist, advise, or overlook the acting executor ; but such assistant, coadjutor, or adviser, is not regarded in the English law as having any of the rights or as subject to any of the duties of an executor.²³ But in all such cases the American courts of probate will allow such assistant to act as joint

²¹ *Pickering v. Towers*, 2 Lee, 401; s. c. Amb. 363. And where probate is granted of two or more papers, as together constituting the will, it is the practice to grant letters testamentary to those named in all the papers. *Goods of Morgan*, Law Rep. 1 P. & D. 323.

²² 1 Wms. Exrs. 211, 212. But it was held in a recent case, that where the whole personal property is left to a trustee, on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor. *Jones in re*, 2 Sw. & Tr. 155. But it is here held requisite to constitute one executor, that he should, by the terms of the will, have general power to receive and pay what is due to and from the estate. Where the will concluded thus: "I must beg A. to appoint some one to see this my will executed," it was held A. might name himself executor. *Ryder in re*, 2 Sw. & Tr. 127; s. c. 7 Jur. N. s. 196. But in the more recent case of *Toomy in re*, 34 Law J. Prob. 3, it was held, that a direction in the will that A. shall pay the debts and funeral charges out of a particular fund, does not constitute him executor of the will, even although the will declares this fund to be all the testator's estate. But this decision must have gone upon special grounds, as it is clearly not reconcilable with the general rule upon the subject. Where a letter was addressed to one, duly signed and witnessed as a testamentary act, which, after stating the nature of the signer's property and giving directions as to its disposition after his death, concluded thus: "I know of nothing else to trouble you with, and trust that this will not involve you in much,"—it was held the person to whom the same was thus addressed was entitled to probate as executor. *Manly in re*, 31 Law J. Prob. 198. But where the will gave a sovereign to each of the witnesses and to the executor, and opposite the names of the witnesses was written "executors and witnesses," it was held not to amount to the appointment of executors. *Goods of Woods*, Law Rep. 1 P. & D. 556. But all the persons named as executors in two or more different instruments constituting the last will may be declared executors by the probate court; unless those named in the paper of later date are named "sole executors," in which case they alone will be so declared. *Baily in re*, L. R. 1 P. & D. 628; *Howard in re*, id. 636.

²³ 1 Wms. Exrs. 213.

executor, unless there is an evident purpose he should not do so ; and this has been often done in the more modern English cases.²⁴

12. It seems the ecclesiastical courts were accustomed to grant letters testamentary as executors to persons named for that purpose by those appointed in the will with that power.²⁵ And this mode of appointing executors or trustees is still recognized in England, under the late statute.²⁶

* 13. The American courts seem to have adopted the same * 72 liberal construction as to the mode of appointing an executor with the English courts.²⁷ And if the testator name persons as trustees, but conferring the rights and duties of executors, it will be regarded as an appointment to that office.²⁸ But the office of executor and trustee under a will are distinct, and are not to be performed in the same capacity.²⁹ The testator cannot appoint a testamentary trustee to act under the will and perform the trusts thereby created, without taking letters testamentary or of administration ; and, having taken such letters, he cannot discharge himself as administrator by paying over to himself as trustee.³⁰

²⁴ *Powell v. Stratford*, cited in 3 Phillim. 118; *Lynch v. Bellew*, id. 424.

²⁵ *Cringan in re*, 1 Hagg. 548. See ante, n. 22.

²⁶ *Jackson v. Paulet*, 2 Robert. 344. Upon the objection being made that the appointment could only be made by a will duly executed, Sir *H. J. Fust* said it was not like the case where the testator in his will reserves to himself a power to deal with his will by writing not duly executed. But that would be of no force under the present statute.

²⁷ *Carpenter v. Cameron*, 7 Watts, 51; *Woods v. Nelson*, 9 B. Mon. 600.

²⁸ *Myers v. Daviess*, 10 B. Mon. 394; *McDonnell*, ex parte, 2 Bradf. Sur. Rep. 32.

²⁹ *Wheatly v. Badger*, 7 Penn. St. 459.

³⁰ *Hunter v. Bryson*, 5 Gill & J. 483. The general subject of the duties and responsibilities of testamentary trustees, and how far they are under the control of the Court of Chancery, is extensively discussed in *The Matter of Van Wyck*, 1 Barb. Ch. 565. All matters of trust, except so far as controlled by statute, are under the direction of the courts of equity ; and the usual course of proceeding in the discharge or appointment of trustees is by bill. *Ib.* See *Knight v. Loomis*, 17 Shepley, 204; *Gibbons v. Riley*, 7 Gill, 81; *Wapples's Appeal*, 74 Penn. St. 100. But in Massachusetts, where by statute trustees are empowered to act without giving bonds, if such is the direction of their appointment it is not required they should receive any commission from the probate court. *Parker v. Sears*, 117 Mass. 513. But a testator may provide that the trustees under the will shall be approved by the judge of probate in a particular district, although such trustees are to be appointed by the surviving trustees as vacancies shall occur from time to time. But the judge of probate is not acting judicially or officially in such approval, but merely under the will ; and no notice of such action is required to be given to the

14. We have already suggested that different executors may have separate and distinct functions.³¹ Thus, one set of executors may be named, and others to succeed them in the event of their being incapacitated or unwilling, for any reason, longer to continue the service.³² But one cannot be appointed executor with a provision that he shall not administer the goods, the latter clause being repugnant to the former, and therefore rendering the appointment inoperative in toto.³³ But two persons may be appointed executors, with a provision that one shall not act during the life of the other;³⁴ or, one may be appointed executor for a definite period, or during the minority of the testator's son, or the widowhood of his wife, or until the death or marriage of his son.³⁵

* 73 If there is an interval between the termination of one executorship and the beginning of another, administration with the will annexed must be given by the probate court.³⁶

15. The testator may also commit the execution of his will in different countries to different executors;³⁷ or the duties may be divided among different executors with reference to the subject-matter,³⁸ it has been said. But Lord *Hardwicke*³⁹ expresses an opinion that such an appointment would be absurd, because executors must act jointly, and each have authority as to the whole estate, "which cannot be divided into distinct and separate powers." And we think the American practice confirms the views of his lordship thus expressed. The English courts hold the same views as to the rights of creditors.⁴⁰

16. The appointment of executors may, like every other portion of the will, be made dependent upon a condition, either precedent or subsequent; as upon giving security for faithful administration;⁴¹ or so long as a certain person was allowed to occupy

parties interested in the trust. *Shaw v. Paine*, 12 Allen, 293; *Nat. W. Bank v. Eldridge*, 115 Mass. 424. And where the probate court, as such, appoint a new trustee in the place of a former one declining, the new trustee will possess all the powers conferred upon the former one. *Nugent v. Cloon*, 117 Mass. 219. ³¹ Ante, § 4, pl. 3. ³² *Lighton in re*, 1 Hagg. 235.

³³ *Anon.*, *Dyer*, 3 b.

³⁴ *Wentworth*, Off. Ex. 13.

³⁵ *Carte v. Carte*, 3 Atk. 180; *Pemberton v. Cony*, Cro. Eliz. 164; *Swinb. pt. 4*, § 17, pl. 1. ³⁶ *Swinb. pt. 4*, § 17, pl. 2.

³⁷ *Spratt v. Harris*, 4 Hagg. 405, 408, 409. See the *Goods of Langford*, Law Rep. 1 P. & D. 458.

³⁸ *Dyer*, 4 a.

³⁹ *Owen v. Owen*, 1 Atk. 494.

⁴⁰ *Rose v. Bartlett*, Cro. Car. 293.

⁴¹ 1 Wms. Exrs. 220.

Blackacre; ⁴² or provided he prove the will within three calendar months after the decease of the testator; ⁴³ and upon failure to perform such condition his appointment fails. ⁴⁴

17. The executor of an executor is by the English law executor of the first testator to an indefinite extent, unless there is a surviving * executor. ⁴⁵ But in the American states this rule * 74 is generally disregarded, special statutes, in most of the states, providing for the appointment of administrators with the will annexed. ⁴⁶

18. Where the will provides, that in the event of the executor named renouncing or resigning the trusts, the probate court shall name another, whom, in the language of the will, "I do hereby appoint to be my executor," it was held proper to issue letters testamentary to such person and not letters of administration with the will annexed. ⁴⁷

19. It seems clear that the courts of equity in England assume the jurisdiction of administering the assets of the estate, where the executor becomes bankrupt, or in other ways irresponsible, and for that purpose appoint a receiver to take custody of the assets for the

⁴² Alice Frances's Case, cited in note, Dyer, 3 b, pl. 8.

⁴³ Wilmut in re, 1 Curt. 1. It was here held, that in computing the time, the day of the death was to be excluded.

⁴⁴ Day in re, 7 Notes of Cases, 553. And where the authority of the executor is restricted, that should appear in the letters testamentary. Barnes in re, 7 Jur. n. s. 195. And where the testator died domiciled abroad the authority of the executor named must be determined according to the law of the domicile; and where the courts of that country have decided that the authority of the executor to act is limited to a certain time, the courts of England treat his office as having expired, and will grant administration with the will annexed, as in other cases, to the universal legatee, and probate of the will to the universal heir. Laneville v. Anderson, 2 Sw. & Tr. 24; Oliphant in re, 30 Law J. n. s. Prob. 82.

⁴⁵ 1 Wms. Exrs. 222-225; 2 Rev. Stat. N. Y. 71, § 17.

⁴⁶ Mass. Gen. Stat. ch. 93, § 9; Vt. Gen. Stat. ch. 50, § 10. Similar provisions exist in all the states where we have examined, but many of them are of recent date, the rule having been otherwise at an earlier period. Drayton's Will, 4 McCord, 46. But it would be useless to repeat the statutory provisions upon the subject. See Dakin v. Demming, 6 Paige, 95. The administrator or executor of one sustaining those relations to other estates in his lifetime can only be made responsible, specifically, to such other estates for assets coming into his hands in specie; those which the decedent had disposed of in his lifetime create only a debt against his estate, which must be pursued in the same mode with other debts against the estate. Montross v. Wheeler, 4 Lans. 99.

⁴⁷ State v. Rogers, 1 Houst. 569.

court, and to administer the same under their direction.⁴⁸ But it will be no sufficient ground for such proceeding that the executor is not in affluent circumstances, if the testator saw fit to appoint him and his responsibility has not changed.⁴⁹

⁴⁸ *Langley v. Hawke*, 5 Mad. 46.

⁴⁹ *Hathornthwaite v. Russel*, 2 Atk. 126; *Howard v. Papera*, 1 Mad. 142. In *Johnson in re*, Law Rep. 1 Ch. App. 325, it was held that if, after the summons for the administration of a testator's estate the sole executor and trustee has become bankrupt, a receiver ought to be appointed, although the assignees are not before the court. But the refusal of the executors to account for large sums of money received by them as general business agents of the testatrix, more than twenty years before her death, which had been left unaccounted for in two settlements made in her lifetime, and the fact that most of the estate consisted of debts due from the executors, are insufficient reasons for their removal, on the ground defined in the statute of Massachusetts, as being evidently unsuitable for the discharge of their trusts. *Hussey v. Coffin*, 1 Allen, 354. The opinion of the court by *Hoar, J.*, upon this point is a very just exposition of the proper grounds for the removal of such officers in the discretion of the probate court. "We are of opinion that the evidence in this case does not show that the respondents have become evidently unsuitable to discharge their trust, and that the decree of the judge of probate should be affirmed. It is not suggested that they are wanting in business capacity, or that they are not of sufficient pecuniary responsibility to render the estate safe in their hands. For any debt which was due from them to the testatrix they may be required to account in the settlement of the estate in the ordinary course of administration; and they and the sureties on their bond will be liable to make it good. If the judge of probate should refuse to charge them with any sum for which they are justly answerable, any party in interest has a remedy by appeal and a right to a trial, with the fullest opportunity for discovery and proof. No right of the heirs or legatees is impaired by their continuance in the trust. If the evidence were satisfactory to show any attempt on the part of the executors at embezzlement or fraudulent concealment of the estate of the deceased, or an intention to resist the acknowledgment or payment of a well ascertained and certain liability, or a refusal or unwillingness to allow the other parties in interest reasonable access to sources of evidence within their official control, it would undoubtedly furnish good cause for their removal. But while the circumstances respecting the receipt of two large sums of money, accompanied with a failure to show any disposition of them authorized by the testator, are certainly remarkable, and a proper subject for careful and thorough investigation, it is apparent, on the other hand, that there is no sum for which they now omit to charge themselves, which they did not in like manner leave unaccounted for in two successive settlements with the testatrix herself. She not only trusted them with the care of her property, but allowed them to use, without compensation or interest, for a long period of years, the great bulk of her estate. This arrangement was not, as it seems, from carelessness or ignorance, but was intentional on her part.

* 20. But as the courts of equity, in this country, only act * 75 in aid of the courts of probate, it is questionable how far they should interfere in such a case, unless where the powers of the probate court were inadequate to effect redress. The usual and the more effective redress in such cases, would seem to be the removal of the executor by the probate courts and the appointment of some responsible person administrator with the will annexed, unless proper security were given by the executor. Where the testator required no bail, and the pecuniary responsibility of the executor had changed, it might be proper to require more security for faithful administration, and then to continue the executor where there was no exception to his competency, except his pecuniary responsibility.⁵⁰

* 21. The subject of equitable interference in the administra- * 76 tion of testamentary trusts is largely examined in an important case⁵¹ in New York, by a judge of great learning and practical good sense, and the following points determined : —

(1.) That at common law one of two joint trustees has no power to execute the trusts, where the other becomes lunatic. But a remedy is provided in many of the states, by statute.⁵²

(2.) A court of equity may remove the disabled trustee and appoint another in his place, or declare the trusts devolved upon the remaining one.⁵³

(3.) A court of equity will not appoint different trustees to perform different portions of the same trust ; but different persons may

There is no proof that she was ignorant of the nature or amount of her property, or that she wanted capacity to understand the import of the accounts which her agents rendered. We cannot therefore regard the continuance by the respondents of a refusal in their capacity as executors, after her decease, to charge themselves with a sum of money for which they had disowned all liability as agents during twenty years of her lifetime without objection or remonstrance on her part as a sufficient proof of unfaithfulness to their trust to require that they should be removed." It has been held, that mere want of pecuniary responsibility in the executor, and which existed and was known to the testator at the date of the will, is no ground for his rejection by the probate court, although an intervening bankruptcy may be. *Shields v. Shields*, 60 Barb. 56.

⁵⁰ Post, § 13, pl. 3 ; § 40, pl. 24.

⁵¹ *Wadsworth in re*, 2 Barb. Ch. 381, *Walworth*, Chancellor.

⁵² 2 Rev. Stat. N. Y. 78, § 44.

⁵³ In this case the statute provided the remedy, but the court could have afforded the same redress on general grounds. 2 Barb. Ch. 381.

be appointed by the will or by the court for the performance of distinct, but related trusts, and those appointed may accept some and decline others.

(4.) The lunatic may be removed from the trusteeship, without affecting his office of executor, but the committee of the lunatic should have notice of such proceedings, and if there be no committee the court will order the hearing delayed for the appointment of one.

(5.) It is here suggested that the Court of Chancery in this state may not possess the power to remove an executor. It seems very obvious that no such power could properly be regarded as residing in the courts of equity, without very essentially abridging the necessary functions and independence of the courts of probate.⁵⁴

22. An executor is always, in some sense, a trustee, but not in the distinctive sense, as contrasted with the ordinary functions of settling the estate and executing the directions of the will, unless where duties are imposed which clearly extend beyond the ordinary duties of the executor. Thus it has been held that a direction in the will that the shares should be kept increasing till the

legatees came of age did not constitute the person named for * 77 that duty a trustee, * but only an executor.⁵⁵ But a direction that the testatrix' children be under the care and control of a person named, and that she wished the provisions of the will in regard to the property left them to be carried into effect, under the direction of that person, did not constitute him an executor.⁵⁶

23. But ordinarily, in this country, where duties are devolved upon the executors extending in time and scope entirely and distinctly beyond those of the mere settlement of the estate and distribution of the assets, and especially where a distinct appointment of a trustee, by that designation, is made for the purpose of performing such duties, or where the executor, in such case, is also called trustee, it is considered, that the functions of the executor cease with the collection and distribution of the assets. Thus where the testatrix gave the bulk of her estate upon trusts, which were declared charitable uses, and provided that the trustees for such charitable uses should convert the personal estate into money

⁵⁴ Galluchat, ex parte, 1 Hill, Ch. 148; ante, § 6, n. 15.

⁵⁵ Nunn v. Owens, 2 Strobb. Law, 101. See also Smith v. Kennard, 38 Alabama, 695.

⁵⁶ State v. Watson, 2 Speers, 97.

and pay her debts and funeral expenses, and appropriate the residue for the purposes of the trusts created, it was declared by the court that those duties thus imposed upon the trustees were inconsistent with those by law imposed upon the executor or administrator with the will annexed, and were therefore inoperative and void; and that it was not proper for the Probate Court to have appointed an administrator with the will annexed, and to have devolved these duties upon him,⁵⁷ but that a trustee appointed by the courts of equity should perform these duties.

24. But in a recent English case,⁵⁸ where the testator directed his debts to be paid and then gave his personal property to trustees to get in as they deemed expedient and divide the proceeds among his children, except the furniture, which he gave to a daughter, it was held that the trustees were executors according to the tenor.

25. There seems to be no question, that, where the will imposes upon the executor duties ordinarily performed by special trustees nominated or appointed for the purpose, those duties may be rendered by the executor, and that his bond as executor will cover the responsibility for such services; and that there is no propriety in changing his office of executor into that of trustee, until all his duties as executor are performed, and his account as such rendered, and the balance in his hands decreed to be passed into his account as trustee, and he has given bonds for faithful administration as such.⁵⁹

26. In one case⁶⁰ the will directed the executor to invest the personal estate in public stocks, and apply the income in a particular manner; and it was held this duty devolved upon the executor as such, and that his bond applied to his doings under such power.

27. And even where the will directed that the income of a sum of money should be paid to a person named, during his life, there being no trustee appointed by the will to perform this duty, it was held that the duty, by law, devolved upon the executor to hold and invest the fund at interest, and pay over the income to the legatee,

⁵⁷ *Drury v. Natick*, 10 Allen, 169.

⁵⁸ *Bayles in re*, Law Rep. 1 P. & D. 21.

⁵⁹ *Saunderson v. Stearns*, 6 Mass. 37; *Prescott v. Pitts*, 9 id. 376; *Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 13 Pick. 328; *Conkey v. Dickenson*, 13 Met. 51; *Prior v. Talbot*, 10 Cush. 1.

⁶⁰ *Hall v. Cushing*, 9 Pick. 395.

and that the ordinary bond as executor covered the responsibility for such management.⁶¹

28. But a will merely appointing the duties of the trustees of a marriage settlement, according to the provisions of the settlement made by a married woman, will not entitle such trustees to act as executors of the will according to the tenor. It is a mere appointment under the settlement.⁶²

29. But unless the court can gather from the words of the will that a person named therein as trustee is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof.⁶³ And where the testator gave several specific legacies, but did not dispose of the residue of his estate, and named his daughter executrix for all the property not named in the will, the court declined to grant probate to the daughter as executrix. Lord *Penzance* said: "The court cannot grant probate to an executor who is precluded from dealing with the property which passes under the will."⁶⁴

30. Where the will makes it the duty of the executor to separate a legacy from the bulk of the estate, within a reasonable time after the decease of the testator, and invest the same at interest for the support and education of the legatee, and he neglects to do so, he will be held responsible for the interest; and no regard to the interest of the residuary legatee will excuse him.⁶⁵

⁶¹ *Dorr v. Wainwright*, 13 Pick. 328; *Town v. Amidon*, 20 Pick. 540; *Prescott v. Pitts*, 9 Mass. 376.

⁶² *Fraser in re*, L. R. 2 P. & D. 183; *Parker's Exrs. v. Moore*, 25 N. J. Eq. 228.

⁶³ *Punchard in re*, L. R. 2 P. & D. 369.

⁶⁴ *Wakeham in re*, L. R. 2 P. & D. 395.

⁶⁵ *Fowler v. Colt*, 25 N. J. Eq. 202.

* CHAPTER III.

THE APPOINTMENT AND DUTY OF ADMINISTRATORS.

SECTION I.

THE NATURE AND ORIGIN OF THE OFFICE.

1. An administrator is one appointed by law to perform the ordinary duties of an executor.
- 2, and n. 3. The basis of the present American law found in the early English statutes.
3. The husband's right to administer on the wife's estate and to hold her personalty.
4. The husband's right to such personalty vests upon the decease of the wife, and before his appointment as administrator.
5. When the wife leaves a will, the husband has no exclusive right to administer cum testamento.
6. The widow of an intestate generally allowed to administer the estate.
7. How the widow may forfeit her right to administer on her husband's estate.
8. Order in which kindred are entitled to administration.
9. Grounds of selection by the probate court among those of equal degree.
10. To whom administration will be granted, decedent being domiciled abroad.
11. Mandamus to probate court, where it has no discretion to exercise.
12. Executor, having begun to act, bound to proceed; next of kin not so bound.
13. Administration granted to attorney-in-fact of him beneficially interested.
14. Creditors, and others interested in estate, entitled, if next of kin decline.
15. For want of those specially entitled the court appoint in their discretion.
16. The order in which parties are entitled to administer in America.
17. Persons disqualified from acting as administrators.
18. Bond required for faithful administration, and how far the court will dispense with ample sureties.
19. Where there are no debts those interested may agree upon the distribution.
20. English Court of Probate refuses to appoint the nominees of the parties interested.
21. Duties and responsibilities of public administrators.
22. The surviving partner should never be appointed administrator on the estate of a deceased partner.

§ 7. 1. AN administrator is, virtually, an executor, to settle the estate of a deceased person, either where no will appears, or if so, where for any reason there is no one to act as executor of the duties imposed by the will. If there be no will, he is simply an administrator, to settle the estate according to the requirements of

the law applicable to the case. He has, in all respects, the same rights and duties, and is subject to the same responsibilities as an executor, except that where the testator directs that his
 * 79 executor * shall act without giving sureties for faithful administration, he cannot be required to do so, unless for special cause shown, the probate court should be of opinion that the rights of creditors and others made such security indispensable to the ends of justice, or where the statutes of the state require such security, in all cases; while the administrator, being an officer of the law merely, is required, in all cases, to give security for the faithful performance of his duties.¹

2. We have already stated, that the appointment of administrators in England is founded upon the statute 31 Ed. 3, st. 1, § 11,² and subsequent statutes.³ It will not be useful to attempt to give

¹ It has been said by most of the text-writers upon this subject, that the executor may do many acts, before his appointment to the office by the probate court; indeed all acts towards the settlement of the estate except maintaining an action in court; and that he may bring such action if he obtain letters testamentary before the trial; but that the administrator can do no act before his appointment; and if he bring an action it shall be abated, notwithstanding his appointment before the return of the writ. Such refinements are of little practical importance. Regularly, neither the executor or administrator should be allowed to do any act in regard to the estate before his appointment by the probate court, except such necessary ones as are indispensable to the preservation of the estate, and as to such, there can be little question they will be brought under the shield of a subsequent appointment from the probate court, as well in the case of an administrator as of an executor.

Where there was a contest whether the decedent died intestate, and if not, which of two wills was valid, it was held, that the executor, first presenting the later of the wills and being recognized by the probate court, *ad interim et pendente lite*, was responsible to the executor in the earlier will, which was finally established as the true will, for any funds remaining in his hands, notwithstanding there had, in the mean time, been appointed an administrator to whom the first executor had been decreed to surrender all assets in his hands, and that in pursuance of such order he had filed his accounts with the register of probate and paid over the balance to such administrator. It was held that such accounting was not conclusive upon the final executor, and no protection to the first executor beyond the amount actually expended and paid over by him, and that for any balance remaining in his hands unaccounted for the final executor might have an action upon the administration bond of the first executor. *State v. Rogers*, 1 Hous. 569.

² Ante, § 6, n. 1.

³ The 21 Henry 8, ch. 5, § 3, provides that in case any person dies intestate,

* any synopsis even, of the statutes in the several Amer- * 80
ican states upon this point, since they are generally based
upon the foregoing statutes of the British Parliament, with others
of a later date; and this detail will best be learned from con-
sulting the statutes in the states where occasion occurs for re-
ducing the point to practice.

3. The husband, by the English law, as is well known to the
profession, had the exclusive right of administering upon his wife's
estate, and was entitled to all her personal effects, after the pay-
ment of debts and charges,⁴ where they had not been reduced to
possession during the life of the wife. But in many of the American
states the disposition of the estate of the wife after death, whether
real or personal, is regulated by statute. In some of those states
that portion of her personal effects, not reduced into the possession
of the husband during the coverture, will, after the decease of the
wife, go to her next of kin by blood,⁵ and no distinction is made in
regard to succession between the real and personal estate of the
wife; while in others the rule of the common law prevails by
express re-enactment of statute.⁶ And the wife, at common

or that the executors named in any testament refuse to prove it, the Ordinary
shall grant administration to the widow or next of kin, or both, in his discre-
tion; and this forms the basis of the present law upon the subject in most of
the American states.

⁴ *Humphrey v. Bullen*, 1 Atk. 459; *Holt*, Ch. J., in *Sir George Sands's*
Case, 3 Salk. 22; *Elliott v. Gurr*, 2 Phillim. 16, 19; *Fawtry v. Fawtry*, 1 Salk.
36; 2 Black. Comm. 515. So the husband is entitled, on behalf of his wife,
to take letters of administration on the estate of the wife's next of kin deceased
intestate, and the wife's renunciation in favor of another, a creditor, will not
deprive the husband of his right. *Haynes v. Matthews*, 1 Sw. & Tr. 460.
But if the husband have deserted his wife, administration of her effects will
be granted to her next of kin, limited to what she had acquired after the de-
sertion. *Worman in re*, 1 Sw. & Tr. 513. But administration will be denied
the husband, where the marriage had been illegally contracted. *Browning v.*
Reane, 2 Phillim. 69.

⁵ Gen. Stat. Vt. ch. 51, § 1.

⁶ Gen. Stat. Mass. ch. 94, § 16. But even where the rule of the common
law prevails, if the personal property of the wife by settlement before marriage
is secured to her next of kin, in the event of her death during the coverture,
the next of kin will be entitled to administration in preference to the husband.
Bray v. Dudgeon, 6 Munf. 132; *Fowler v. Kell*, 14 Sm. & M. 68. In Missis-
sippi, only the husband, or widow, or the distributees, are entitled, as of
right, to claim administration. The appointment of others is within the dis-
cretion of the court. *Byrd v. Gibson*, 1 How. (Miss.) 568. But where the

* 81 law, * could not dispose of her personal effects, not in the possession of the husband, even by will, without his consent.⁷

4. If the husband decease, without having taken letters of administration upon the wife's estate, the probate court will sometimes grant administration to her next of kin, but such administrator will be regarded as the trustee for the representatives of the husband.⁸ But the practice of granting administration in the ecclesiastical courts to the wife's next of kin, in cases where they are not beneficially interested in the effects, has been regretted by some of the judges.⁹ And the practice seems finally to have been abandoned,¹⁰ and administration only granted to the next of kin of the wife, when they were entitled to her effects by settlement.¹¹ And a similar rule obtains in many of the American states.¹² A court of equity will order a fund in the Court of Chancery, standing to the separate account of a married woman, transferred to her personal representative, although the husband is not represented in court, he having survived the wife and deceased without taking administration of her estate.¹³

5. Where the wife, either by marriage settlement or otherwise,

wife separated from her husband and obtained a protection-order, and deceased leaving a minor son and her husband surviving, administration was granted to the guardian elected by the son, without citing the father, security being given. Stephenson in re, Law Rep. 1 P. & D. 287.

⁷ Ante, Vol. I. pp. 22-29.

⁸ *Elliot v. Collier*, 3 Atk. 526. Lord *Hardwicke* here said, "Upon the equity of the statute of distributions the court makes an administrator de bonis non only a trustee for such part of the testator's personal estate as is undisposed of, for his next of kin; therefore I am of opinion the husband's representative is entitled to the wife's personal estate, and that it vested in the husband before administration was taken out." So also in *Pountney in re*, 4 Hagg. 289. See, to the same effect, *Clark v. Clark*, 6 W. & S. 85. And the husband, although not resident within the state, is entitled to administer upon the wife's estate. *Weaver v. Chace*, 5 R. I. 356. And this is held even in those states where non-residence is generally regarded as a disqualification for the office of administrator. *Sarkie's Appeal*, 2 Penn. St. 159.

⁹ *Gill in re*, 1 Hagg. 341, 344.

¹⁰ *Fidler v. Hanger*, 3 Hagg. 769; 1 Wms. Exrs. 360.

¹¹ *Brenchley v. Lynn*, 9 Eng. L. & Eq. 583; s. c. 16 Jur. 292.

¹² *Ward v. Thompson*, 6 Gill & J. 349; *Sheldon v. Wright*, 5 N. Y. 497; *Patterson v. High*, 8 Ired. Eq. 52; *Hilborn v. Hester*, id. 55; *Randall v. Shrader*, 17 Ala. 333.

¹³ *Gutteridge v. Stilwell*, 1 My. & K. 486; *Loy v. Duckett*, 1 Cr. & Ph. 312; 1 Wms. Exrs. 361.



has the right to dispose of her estate by will, even though it be by the consent of the husband merely, and does make such disposition, and no executor is legally appointed to such will, the probate * courts will grant administration with the will * 82 annexed, as in other cases, the husband having no exclusive right to act in that capacity.¹⁴

6. It seems that the probate court have, under the English statute, been regarded as having a discretion whether to grant administration to the widow or next of kin.¹⁵ This rule, however, in the English courts, applies only to cases of intestacy, and not to those cases where there is a will, but for any cause, no executor, — in which class of cases the probate court may exercise a discretion, in selecting the person most suitable for the trust. In the American states, the probate courts have the same discretion in both classes of cases. And in general, the widow will here receive the appointment alone, if she so desire, and there be no special reason to the contrary.¹⁶ And if she desire any suitable person to

¹⁴ *Brenchley v. Lynn*, 2 Rob. 441. But the husband may in such cases be entitled to have administration of such of his wife's effects as are not thus disposed of. *Ib.* See also *Dawson in re*, 2 Rob. 135. But the husband cannot administer upon an estate of which the wife was administratrix. 1 Wms. Exrs. 263.

¹⁵ *Anon.*, 1 *Strange*, 552. Where the widow deserted her children and led an immoral life, administration of her husband's effects was granted to the guardian of the children. *Creed in re*, 6 Jur. n. s. 590.

¹⁶ *M'Gooch v. M'Gooch*, 4 Mass. 348. If there are creditors, the widow and next of kin may elect to have administration granted to them. *Stebbins v. Lathrop*, 4 Pick. 33. But she may be excluded for any cause rendering her evidently unsuitable for the discharge of the trust. *Stearns v. Fiske*, 18 Pick. 24. And in this case it was regarded as sufficient cause for her exclusion, that her appointment was urged by a debtor of the estate, who was under the imputation of having combined with the testator in his lifetime to defraud his creditors, and that her appointment was apparently urged more for the purpose of subserving the private purposes and interest of such debtor than for the protection of any interests of such widow. It is competent, but unusual, for the probate court to associate with the widow in the administration, some suitable person, in no way related to the estate or those entitled to receive it. *Shropshire v. Withers*, 5 J. J. Marshall, 210. And in all cases, in the selection of one for the purpose of administering the estate, a man accustomed to the business he will be called to transact will be preferred. *Williams v. Wilkins*, 2 Phillim. 100. In a recent case before Lord *Penzance*, *Richards in re*, L. R. 2 P. & D. 216, where the deceased died intestate, leaving a widow and several minor children, the widow being wholly unacquainted with her husband's business, but a surviving brother had assisted him in his business

have the administration, or for any good reason not to have it, her wishes will in general be consulted.¹⁷ The widow will be excluded from administration, in some states, on account of being a non-resident.¹⁸

* 83 * 7. It is often said the ecclesiastical courts prefer a sole to a joint administration, and that the widow will be preferred to any other, unless special reasons exist why she should not receive the appointment; ¹⁹ as where she has barred herself of all interest in her husband's personal estate by her marriage settlement; ²⁰ or where she is of unsound mind; ²¹ or has eloped from her husband or lived separate from him.²² The wife having married again is no invincible objection to her being administratrix of her former husband, but that circumstance may induce the court to prefer a child.²³ Where the husband had been divorced and married again, the second wife should administer; ²⁴ and a wife divorced for adultery forfeits all right to administer upon the effects of her former husband.²⁵

8. As to the question who are the next of kin, and as such entitled to administration, it seems to have been held by the ecclesiastical courts, that it should be the same persons entitled to the goods of the deceased person under the statute of distributions.²⁶ And although it has been said the statute of distributions must be

and understood the state of the property, it was held not sufficient ground for associating the brother, who was the guardian of the children, with the widow in the administration. The widow was preferred to a son of a deceased son of the intestate. *Gyger's Estate*, 65 Penn. St. 311. Coverture is no disqualification for the appointment, if otherwise entitled. *Ib.*

¹⁷ *Muirhead v. Muirhead*, 6 S. & M. 451.

¹⁸ *Radford v. Radford*, 5 Dana, 156.

¹⁹ 1 Wms. Exrs. 363, 364.

²⁰ *Walker v. Carless*, 2 Cas. temp. Lee, 560.

²¹ *Williams in re*, 3 Hagg. 217; *Dunn in re*, 5 Notes of Cases, 97.

²² *Lambell v. Lambell*, 3 Hagg. 568; *Chappell v. Chappell*, 3 Curt. 429.

²³ *Webb v. Needham*, 1 Add. 494, 496.

²⁴ *Ryan v. Ryan*, 2 Phillim. 332.

²⁵ *Pettifer v. James*, Bunbury, 16; *Davies in re*, 2 Curt. 628. It is no ground of excluding the wife de facto from administering the husband's estate after a cohabitation of twenty years, in the bonâ fide belief of the death of her former husband, that such former husband is still living. *White v. Lowe*, Redf. Sur. Rep. 376. But a merely colorable cohabitation with a woman will not entitle her to administer as the widow. *Davis v. Brown*, id. 259.

²⁶ *Sir John Nicholl*, in *Gill in re*, 1 Hagg. 342.

construed according to the common law,²⁷ the rule of reckoning the degrees of kindred, under the English statute of distributions, which has finally prevailed, is that of the civil law,²⁸ whereby the reckoning is made by going directly from the deceased to the person claiming, where such person is either a direct ancestor or descendant, and in the case of collaterals, by counting the degrees to a * common ancestor, and then down to the collateral in * 84 question, allowing one degree for each step. Thus the father and son are in equal degrees of kin, and so of the grandfather and grandson. And all the kindred in equal degree, whether male or female, have the same right to administration, except that a preference is given to males before females in an equal degree; and children are entitled before all others; and the issue of deceased children come in their places, by way of representation.²⁹ So, it seems that brothers and sisters are preferred, as to the right of administration, to the grandfather or grandmother, who are in equal degree with the brothers and sisters. And relations on the mother's side are in equal degree with those on the father's side, and the half blood the same as the whole blood; so that the children, and their issue in case of their decease, are first entitled; the parents next; then brothers and sisters; and then the grandparents; then uncles and nephews; next, great-grandparents; and finally cousins.³⁰

9. There is no certain rule by which to guide the discretion of the probate court in selecting among those of equal degrees of affinity, as no two cases will ever be precisely alike in all their circumstances. But it is said they should, and naturally will, prefer that person in whom the greatest number and weight of interests concur; that, other things being equal, the elder should be preferred to the younger, and a son to a daughter; and one accus-

²⁷ *Blackborough v. Davis*, 1 Peere Wms. 41, 49, where it is said by *Holt*, Ch. J., that a prohibition will issue to prevent the ecclesiastical courts from proceeding under the statute Car. 2, contrary to the rules of the common law.

²⁸ *Wallis v. Hodson*, 2 Atk. 114, 117; *Mentney v. Petty*, Prec. Ch. 593; 1 Wms. Exrs. 365.

²⁹ *Carter v. Crawley*, Sir T. Raymond, 496; *Evelyn v. Evelyn*, Amb. 192.

³⁰ 2 Black. Com. 505; 1 Wms. Exrs. 372. We shall have occasion to refer to this subject again, under the head of distribution of estates. The guardian of an infant, the sole next of kin, is preferred to a creditor, and the latter cannot demand justifying bail. *John v. Bradbury*, Law Rep. 1 P. & D. 245. See also *Hay in re*, id. 51.

tomed to business to one less acquainted with it; and the fact that one had been twice before declared bankrupt has very justly been regarded as sufficient ground of determining a preference³¹ against the claimant.

10. Where the intestate was a foreigner, and had no domicile in the state where administration is applied for, the court will grant it to such person as is entitled to the effects by the law of the place where the deceased had his last legal domicile, as distribution of such effects must be made according to that law.³² But where administration has already been obtained in the place of domicile, and one is sought merely in aid of that, the courts will give preference to the person holding the principal administration.³³

11. It seems that where the probate court refuse to grant administration to any one, or to the party solely entitled to the same, a writ of mandamus will issue to compel them to make the grant, but not in any case where any question of discretion exists in regard to the person entitled.³⁴

12. There seems to be a distinction between an executor and the next of kin in regard to being bound to act as executor or administrator, after they have intermeddled with the goods of the deceased. In the former case, the person is compellable to perform the duties of administering, but not in the latter, even

³¹ 1 Wms. Exrs. 373, 374; *Bell v. Timiswood*, 2 Phillim. 22. In *St. Jurjo v. Dumcomb*, 2 Brad. Sur. Rep. 105, it was held that in the case of a foreign will, it is the usage to grant administration with the will annexed to the attorney-in-fact of the foreign executor. But if no one is authorized to act in that capacity and receive administration on behalf of the executor abroad, then administration will be given to the widow, or next of kin, the order of precedence usual in regard to estates within the state. A married daughter more than twenty-one preferred to the guardian of a minor. *Cottle v. Vanderheyden*, 56 Barb. 622.

³² 1 Wms. Exrs. 376, 378.

³³ *Henderson in re*, 2 Rob. 144; 1 Wms. Exrs. 377. And where of two persons in the same degree, equally fit for the office in other respects, one resided out of the state, the one residing within the state is ordinarily entitled to administration; but if he present a claim against the estate which is contested, it is properly within the discretion of the probate court to prefer the one resident abroad. *Pickering v. Pendexter*, 46 N. H. 69.

³⁴ 1 Wms. Exrs. 380, 381. The right of administration pertains to such only as are the next of kin at the decease of the intestate, and upon the decease of such person, the right devolves upon the person entitled to the effects.

where he has by such interference made himself executor de son tort.³⁵

13. Where the person entitled to the effects of the decedent resides out of the state, it is common in England to grant administration to the attorney-in-fact of such person, under a special power, and to express in the grant that it is for the use and benefit of the party so entitled.³⁶ But such administrator and his sureties are responsible to the party, and to all parties who may be able to * show themselves entitled to receive the effects of the * 86 deceased, and cannot exonerate himself by showing payment to the person for whose benefit the administration was granted.³⁷

14. In defect of next of kin, or where, upon summons, such next of kin fails to appear, or declines to receive administration, it will be granted to any suitable person applying, being a creditor or in any way interested in the estate. In such cases, even where there had been long delay in taking administration, and the next of kin resided in the West Indies, Sir *John Nicholl* required notice to be given him before he would grant it to a creditor.³⁸ And where administration has been once granted to a creditor, he will not be

³⁵ *Ackerley v. Parkinson*, 3 M. & S. 411; 1 Wms. Exrs. 242. But where one acts as executor de son tort in compromising the debts due the estate, before the appointment of an administrator, and is subsequently appointed to such office, he will be bound by such volunteer acts to the same extent as if he had received his appointment before. *Alvord v. Marsh*, 12 Allen, 603.

³⁶ *Lucas v. Lucas*, 2 Lee, 576; *De la Viesca v. Lubbock*, 10 Sim. 629; *Chambers v. Bicknell*, 2 Hare, 536, 537.

³⁷ *Chambers v. Bicknell*, 2 Hare, 536. And such administration may be granted to the attorney of the party entitled, although the attorney be resident abroad, if the sureties to the bond are resident within the jurisdiction. *Lesson in re*, 1 Sw. & Tr. 463; *Bianchi in re*, id. 511. But the court will not grant administration to the attorney-in-fact, for the use of the party entitled, where the party himself is resident within the jurisdiction, and able to take it himself. *Burch in re*, 2 Sw. & Tr. 139; *Dig. 7 Jur. n. s. 85*. Administration was granted to one who had undertaken the expense of the funeral at the request of the residuary legatee. *Newcombe v. Beloe*, Law Rep. 1 P. & D. 314. But the court will not grant administration to an undertaker, until informed of the circumstances under which the expense was incurred, and at whose instance. *Ib.*

³⁸ *Miller v. Washington*, 3 Hagg. 277. See also *King v. Gordon*, 2 Lee, 139. But the fact that the creditor's debt was barred by the statute of limitations was held no bar to his appointment, on condition that he gave bonds to distribute the assets pro rata among all the creditors. *Coombs v. Coombs*, Law Rep. 1 P. & D. 288; *In the Goods of Coombs*, id. 193.

removed at the instance of the next of kin, but in case of his decease, the next of kin may come in.³⁹ And if a will appears after a creditor has been appointed administrator, he will have the same right to contest the will with the next of kin, and under the same rule as to costs.⁴⁰

15. For want of creditors, or next of kin willing to take administration, the probate court may, in its discretion, grant it to any one desiring it.⁴¹ It is an inflexible rule in the English courts of probate, and should be everywhere, that a party who has a prior right to administer should be properly cited to appear, before administration will be granted to any other, although having the right of administration next in order; but where the court * 87 have * any discretion in the matter they sometimes appoint an administrator upon their own motion,⁴² *ex mero motu*, as it is called.

16. The American practice upon most of the preceding points will be found generally to coincide with the English, as already indicated, except that in many of the states the right of administration is not so strictly defined as under the English statutes and practice. Thus in Virginia, any one entitled to a distributive share of the estate is preferred to a creditor;⁴³ and a creditor seems there to have no legal preference over any other person.⁴⁴ But in some states creditors are preferred in the order of the amount of their claims.⁴⁵ And in other states creditors appear to have a preference over mere strangers.⁴⁶ The right of the next of kin to

³⁹ *Skeffington v. White*, 1 Hagg. 699, 702, 703.

⁴⁰ *Norman v. Bourne*, cited in *Dobbs v. Cherman*, 1 Phillim. 160. That is, without being subjected to costs in the event of the will being established.

⁴¹ Sir *Herbert J. Fust*, in *Chanter in re*, 1 Rob. 274, 275; *Davis v. Chanter*, 4 Simons, 212. But the present English Court of Probate hold the statute, § 73 of the Probate Act, imperative upon the question, who shall be appointed administrator, unless there are special circumstances requiring a departure, as the statute provides. And the agreement of the parties entitled, to have another administrator, will not be sufficient to justify the court in making the appointment. In the *Goods of Hale*, L. R. 3 Prob. & D. 207, citing some other cases, post, pl. 20.

⁴² *Barker in re*, 1 Curt. 592; *Rogerson in re*, 2 Curt. 656.

⁴³ *Haxall v. Lee*, 2 Leigh, 267.

⁴⁴ *M'Candlish v. Hopkins*, 6 Call, 208.

⁴⁵ *Cutlar v. Quince*, 2 Hayw. 60. But see *Freeman v. Worrill*, 42 Ga. 401.

⁴⁶ *Hoffman v. Gold*, 8 Gill & J. 79. And in one case where the estate was barely sufficient to meet debts, it was committed to the administration of a

administration attaches upon the exclusion of the widow, for any cause, so that if she decline to serve, it is not competent for her to nominate another person to the exclusion of the next of kin.⁴⁷ The Statute of Massachusetts gave the right of administration, first to the widow or next of kin, either or both, as the judge might order, and it was here said, "In the present case the widow renounced her claim; but this did not give her the right to nominate another person to the exclusion of the next of kin. If they live within the county they are to be cited." And where the statute provided, that if such next of kin are incompetent or evidently unsuitable, or if they neglect without any sufficient cause, for thirty days after the death of the intestate, to take administration, the judge of probate shall commit it to one of the creditors, it was held that the probate court could not pass over the next of kin and appoint another, until the expiration of the thirty days, that term being allowed the next of kin to apply; and that an appointment, for reason of the incompetency of the next of kin, must, at * least, show the fact, that the appointment was * 88 made upon that ground, and that the next of kin became parties to such proceeding before the adjudication of such incompetency.⁴⁷ Where a creditor is appointed administrator on account of the renunciation of the widow and next of kin, such renunciation should appear of record. General notice by publication for all objecting to the appointment of a creditor as administrator, will be a sufficient citation to those having prior right, and especially where they have notice in fact and actually appear in the case.⁴⁸ It seems that in Pennsylvania the nomination of the next of kin,

creditor in preference to the next of kin. *Sturges v. Tufts*, R. M. Charlton, 17.

⁴⁷ *Cobb v. Newcomb*, 19 Pick. 337, by *Shaw*, Ch. J. Any person having a cause of action which survives, is regarded as a creditor, otherwise not. Hence the promisee, in a promise of marriage, cannot be regarded as the creditor of the promisor within the statutes regulating the granting of letters of administration. *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408. And where a negotiable promissory note of the decedent is indorsed, the indorsee is the creditor, until the indorser is compelled to reimburse him, when the indorser will become such. *Lumber Co. v. Guy*, 40 Conn. 163. And the indorser will in such case be entitled to all the rights of creditors where rights accrue while the estate is in the course of settlement. *Ib.*

⁴⁸ *Arnold v. Sabin*, 1 Cush. 525. One applying for administration as a creditor may prove such fact in the usual mode of establishing such claim. *Ib.*

who declines to administer, is entitled to be regarded by the probate court.⁴⁹

17. By the English statutes and practice many persons are disqualified from acting as administrators. These disabilities extend not only to those already enumerated in regard to executors, but embrace also some others, such as outlawed persons and bankrupts, but not to alien friends.⁵⁰ Infants are disqualified from acting until they come of full age, and for that period administration should be committed to another.⁵¹ Females covert may take administration with the consent of their husbands, but not otherwise, unless such husbands reside out of the country.⁵² In Maryland, it is no disqualification that one is a cloistered nun,⁵³ but under the Revised Statutes of New York a professional gambler was held disqualified on the ground of improvidence.⁵⁴ In another court,⁵⁵ however, in the same case, it was said, that no degree of moral or legal guilt or delinquency, is sufficient to effect such exclusion, * unless the person has been "convicted of an infamous crime," or is "judged incompetent by the Surrogate to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding," these being the statute grounds of exclusion. It was accordingly here held, that the single fact of one being a professional gambler did not disqualify him to act as administrator under the statute. And the same rule, as before intimated as to executors, seems to be maintained in a considerable number of other cases.⁵⁶ In some of the states a married woman is disqualified, by statute, from acting as administrator, and in

⁴⁹ *Ellmaker's Estate*, 4 Watts, 34. See also *Shomo's Appeal*, 57 Penn. St. 356.

⁵⁰ 1 Wms. Exrs. 390. As to the right to administer in Maryland, see *Kearney v. Turner*, 28 Md. 400.

⁵¹ This will be considered hereafter. Post, § 11.

⁵² *Bubbers v. Harby*, 3 Curt. 50; 1 Wms. Exrs. 391. And where a married woman had been deserted by her husband and was next of kin to a deceased person leaving an estate, the court made a conditional order that some other one might execute a bond on her behalf, and she receive the appointment, unless the husband showed cause to the contrary within six days after notice to his solicitor. In *re Nicholas Moore*, 18 W. R. 472.

⁵³ *Smith v. Young*, 5 Gill, 197.

⁵⁴ *McMahon v. Harrison*, 10 Barb. 659.

⁵⁵ *Harrison v. McMahon*, 1 Bradf. Sur. Rep. 283.

⁵⁶ *Sill v. M'Knight*, 7 W. & S. 244; *Cohen's Appeal*, 2 Watts, 175; *Webb v. Dietrich*, 7 W. & S. 401; *Coope v. Lowerre*, 1 Barb. Ch. 45; ante, § 6.

such cases administration is given to the husband, as representative of her right or interest in the estate.⁵⁷

18. It is generally supposed that in the case of administrators appointed by the probate court, in this country, that there is no power to dispense with the requisite security pointed out in the statute; and any one who cannot obtain the required bond, with sureties for faithful administration, is set aside for the one entitled next in order. But in England the cases are frequent where the amount of the bond ordinarily required, i.e., double the amount of the estate, is essentially relaxed.⁵⁸ If any thing is ever done here, in the same direction, it is by accepting the best sureties which the party can procure, which is coming to the same result, without any formal violation of the letter of the law, but none the less evading it.

19. It has been held⁵⁹ that where there were no debts owing by an estate, and the widow and heirs agree to a distribution of the same, that there is no just occasion for the appointment of an administrator, and that one who is appointed, under such circumstances, has no claim upon the property for the expenses of administration, the distributees having a complete equity in the same next after creditors. This case seems to us based upon the clearest equity, and the most unquestionable good sense.

20. They have one rule, before alluded to, in the English Court of Probate, which may sound somewhat singular to most persons here, but which seems not without some just foundation in reason and prudence. The court said, in one case,⁶⁰ that the consent of all parties interested was not sufficient to justify the court in departing from the provisions of the statute and the practice of the court in appointing administrators. The counsel cited two

⁵⁷ *Leverett v. Dismukes*, 10 Ga. 98; *Kavanaugh v. Thompson*, 16 Ala. 817.

⁵⁸ *De la Farque in re*, 2 Sw. & Tr. 631; *M'Donald in re*, 32 Law J. N. S. Prob. 132; *Harrigan in re*, id. 204. And sureties resident in Scotland were accepted when others could not be procured. *Ballingall*, id. 138. But in a later case, *The Goods of Houston*, L. R. 1 Prob. & Div. 85, Sir *R. P. Wilde* said, the court had declined to accept sureties resident in Scotland, *Herbert v. Sheil*, 3 Sw. & Tr. 479; but in the present case, as there were no creditors, and the administrator was the only person beneficially interested in the estate, he would depart from the general rule, and accept such sureties.

⁵⁹ *Walworth v. Abel*, 52 Penn. St. 370.

⁶⁰ *Richardson in re*, L. R. 2 P. & D. 244. See also *Teague v. Wharton*, L. R. 2 P. & D. 360; ante, n. 41.

cases⁶¹ in favor of granting a joint administration to three persons agreed upon by the parties interested. But the court said: "If all suitors in this court, and persons entitled to grants, were persons of intelligence and knowledge of business matters, such a rule might be unobjectionable." [Such persons may be trusted to transfer to others the right to deal with their property.] "But the court must bear in mind that suitors and persons entitled to grants in this court are, many of them, persons who have no opportunity of knowing their own rights, and are not aware of the dangers that may beset them if they transfer their rights to other persons." The court, therefore, felt bound to adhere to the rule giving administration to the party entitled to the property, according to the rule "which had been acted on by the ecclesiastical courts for centuries."

21. Provision is made in some of the states for the appointment, in the same way that other officers are appointed, of a public administrator. The public administrator of the city of New York is, by the statute, subjected to the same responsibility for his acts done in the assumed discharge of his duties that other administrators are by law, and the city are also, by statutory provision, made responsible for all his acts.⁶² It is the duty of the public administrator, in any particular district for which he is appointed, to administer upon all estates where there is no provision of law by which any other person, in particular, is specially entitled to the office, or required to perform the duty; and he may be compelled to take charge of the assets of a partnership, where it has been dissolved by the decease of one of the partners and no personal representative has been appointed; and he cannot afterwards be divested of the estate, except by order of the probate court.⁶³

22. It has been held, that the surviving partner should never be appointed to administer upon the deceased partner's estate; and there seems great justice and propriety in the rule, since the interests of the two partners will necessarily become antagonistic, in many respects, in regard to the closing of the affairs of the partnership, which will be indispensable to the full and final settlement of the estate of the deceased partner.⁶⁴

⁶¹ *Farrell v. Brownbill*, 3 Sw. & Tr. 467; *In the Goods of Grundy*, Law Rep. 1 P. & D. 459.

⁶² *Levin v. Russell*, 42 N. Y. 251.

⁶³ *Headlee v. Cloud*, 51 Mo. 301.

⁶⁴ *Heward v. Slagle*, 52 Ill. 336.

* SECTION II.

* 90

THE APPOINTMENT OF ADMINISTRATORS, AND THE EXTENT OF THEIR
RESPONSIBILITY. JOINT EXECUTORS AND ADMINISTRATORS.
BONDS.

1. The mode of appointing administrators.
- n. 1. The English form at present in use.
2. The form and legal validity of administrator's bonds.
3. The decisions in Massachusetts upon this point.
4. The form of executors' bonds.
5. How far joint executors responsible for the acts of each other.
6. A final judgment in the probate court should precede a suit upon the bond.
7. The bond is intended to secure the enforcement of the decrees of the probate court.
8. Defective inventory, breach of bond ; and final account no bar unless it embrace same property.
9. Some states allow those interested to recover the value of goods, not inventoried, on bond.
10. But if probate court decree payment of fixed sum, although defined with reference to the judgment of another court, it will be sufficient.

§ 8. 1. THE appointment of an administrator is, in the American practice, more commonly, it is believed, in the form of a decree of the probate court. In the English practice, it is said that it must be by writing, under seal, or by entry in the registry, without letters sub sigillo, but it cannot be by parol.¹ The same is true of granting leave to put an administrator's bond in suit.²

¹ Anonymous, 1 Shower, 408, 409 ; Toller, 119. The form of granting administration in the English Court of Probate, at the present time, is as follows : " In her Majesty's Court of Probate, the Principal Registry. Be it known that, on the — day of, &c., letters of administration of all and singular the personal estate and effects of A. B., late of, &c. —, deceased, who died on or about the — day, &c., at —, intestate, were granted by her Majesty's Court of Probate to C. D., the widow, or next of kin (as the case may be) of the said intestate, she having been first sworn well and faithfully to administer the same, by paying his just debts, and distributing the residue of his personal estate and effects according to law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof whenever required by law so to do. E. F., Registrar." And in the margin is written, " Sworn under £—. And that the intestate died on or about the — day of —."

² Fay v. Rogers, 2 Gray, 175.

* 91 * 2. The person appointed, before receiving his letters of administration, is, by the statutes of all the states, required to give bonds for faithful administration,—the same, in most respects, as required by the English statutes,³ except that in different states the bond is required to be taken in the name of the commonwealth, or of the judge of probate, or of the probate court.⁴ But in the last case cited it was held, that the bond, being taken in the name of the justices of the county court, did not render it void. But in some of the other states slight deviations from the statutory forms required, has been held to avoid the instrument,⁵ as where the bond of an administrator, with the will annexed, was taken in the usual form of administrator's bonds on intestate estates, except that there was no obligation to restore the letters to the court in case of the production and proof of a will, and it omitted the clause "to pay and deliver all the legacies," merely requiring faithful administration and payment according to the decree of the court; and it was held void as a statutory obligation, and that it could not be enforced by a legatee against the principal and his sureties. But the omission of the provision for the benefit of creditors will not avoid the effect of that in favor of distributors.⁶ But if the bond contain no obligation on their behalf, they can maintain no action upon it.⁷ It has sometimes been held that such a bond, with but one surety, is absolutely void.⁸ But in a later case the rule is somewhat modified.⁹ And such a defect in the bond will not defeat the suit in the name of the administrator.

3. In Massachusetts there have been a considerable num-

³ 21 Henry 8, ch. 5, § 3; 22 & 23 Car. 2, ch. 10, § 1. These statutes require two or more able sureties, respect being had to the value of the estate, which was to be in the name of the Ordinary. The points of the obligation were, to return an inventory of the goods; faithfully to administer the same; to render a true account to the court; to pay over the balance in his hands according to the decree of the court.

⁴ *Miltenberger v. Commonwealth*, 14 Penn. St. 71; *Johnson v. Fuquay*, 1 Dana, 514.

⁵ *Walker v. Crosland*, 3 Rich. Eq. 23. A similar decision was made in *Williamson v. Williamson*, 3 S. & M. 715; and in *Small v. Commonwealth*, 8 Penn. St. 101.

⁶ *Carrol v. Connet*, 2 J. J. Marshall, 195.

⁷ *Arnold v. Babbit*, 5 J. J. Marshall, 665.

⁸ *M'Williams v. Hopkins*, 4 Rawle, 382.

⁹ *Mears v. Commonwealth*, 8 Watts, 223.

ber of * decisions in regard to administration bonds. If * 92 not signed by the administrator, it is not binding, even upon the sureties.¹⁰ And if altered, after being signed by two sureties, with the consent of the principal only, and then signed by two other sureties, ignorant of the alteration, it is not binding upon any of the sureties; not upon the first two because altered without their consent; not upon the other two because not informed of the release of the two former.¹¹

4. Where the statute prescribes the form of an administrator's bond, and requires executors to give bonds in the same form, the bond of the latter may be so far varied from the form as their duties are different from those of an administrator.¹² An executor's bond, where each surety was bound in half the sum of the principal, although informal, is not on that account void, but is binding upon the obligors and sufficient to give effect to the appointment.¹³ By the Massachusetts statute¹⁴ it is provided that the executor shall be exempted from giving surety or sureties, on his bond, whenever the testator so directs, in his will, or when all the persons interested in the estate, who are of full age and legal capacity, other than creditors, certify to the court their consent

¹⁰ *Wood v. Washburn*, 2 Pick. 24.

¹¹ *Howe v. Peabody*, 2 Gray, 556. But the alteration must be material. *Casoni v. Jerome*, 58 N. Y. 315.

¹² *Hall v. Cushing*, 9 Pick. 395.

¹³ *Baldwin v. Standish*, 7 Cush. 207. It seems, that where the bond is wholly void, that some judges have considered the appointment void. — *Parker*, Ch. J., in *Picquet*, Appellant, 5 Pick. 76. But unless the form of the statute naturally leads to this result, the omission of any such formality could not, upon general principles, avoid the appointment. See also *Ordinary v. Cooley*, 1 Vroom, 179.

¹⁴ Gen. Stat. ch. 93, § 5. And as a general rule, it may be assumed, that the direction in the will to excuse the executors from finding sureties for faithful administration will only extend to beneficiaries under the will, and not to cases where the rights of creditors may be affected. *Buckner v. Wood*, 45 Miss. 57. But even where the executor is excused from finding sureties, a bond voluntarily given will be obligatory. *Ames v. Armstrong*, 106 Mass. 15. And a second bond given by an administrator will embrace the failure to pay over to the guardian of minor heirs any sums in his hands their due, notwithstanding he had appropriated the same to his own use before filing the second bond. This was so held upon the ground, that the failure to pay over was a constant and continuing breach of duty, as well after the execution of the second bond as before, and so constituted a breach of such bond as soon as filed. *Pinkstaff v. People*, 59 Ill. 148.

thereto. But notice is first required to be given to creditors and the guardians of any minor, and they have opportunity to show cause against the same. It was held that such notice may be given by publication in a newspaper, addressed to the creditors, next of kin, and all other persons interested therein, although there be a minor, having a guardian interested in the estate. But if, after a decree exempting him from giving sureties, on his official bond, the executor files a bond dated on the day of the presenting of the will for probate, bearing the approval of the judge of probate in due form, but dated and written on the day of * 93 the date of the bond, this will be a sufficient * bond, and the statute of limitations will operate in favor of the executor from the day on which it is filed, on the ground, that the bond takes effect from the time of filing in the probate court.¹⁵

5. It seems that where joint executors execute a joint bond for faithful administration, both are responsible for all the acts of the other during the continuance of the joint executorship.¹⁶ But, if, after the decease of one of them, the other is guilty of a devastavit, for which his sureties are held responsible, they have no claim for indemnity against the heirs, devisees, or legal representatives of the other executor.¹⁶ One joint administrator is liable solely

¹⁵ *Wells v. Child*, 12 Allen, 330, 333. But in most of the states the matter of excusing the executor from giving bonds for faithful administration is so much in the discretion of the probate court, that they may be required even where the will dispenses with them, if any special reason exists for departing from the directions of the will. *Clark v. Niles*, 42 Miss. 460; *Atwell v. Helm*, 7 Bush, 504.

¹⁶ *Brazier v. Clark*, 5 Pick. 96. See also *Hill v. Davis*, 4 Mass. 137; *Towne v. Ammidown*, 20 Pick. 535; *Newcomb v. Williams*, 9 Met. 525; *Ordinary v. Barcalow*, 36 N. J. L. 15. And the rule is the same where joint executors, not required to give bonds, nevertheless do give a joint bond. *Ames v. Armstrong*, 106 Mass. 15. The same question has arisen often in the different states, and has been regarded as settled in the manner stated in the text, from an early day. The question is a good deal examined in the case of *Sparhawk v. Buell's Adm'r*, 9 Vt. 41, and the following propositions declared. One executor is not liable for the devastavit of another joint executor, where he never had control or possession of the funds; but if both take possession jointly, or if one having possession of the goods suffer them to go into the hands of another executor, who squanders them, both are liable for the waste. But see *Robinson's Estate*, 7 Phila. Reports, 61. If executors give a joint bond for faithful administration, each is liable for the acts of the others. This last proposition is maintained in *Boyd v. Boyd*, 1 Watts, 368; *Bostick*

for the debts contracted by him in the settlement of the estate. They are not covered by the bond.¹⁷

6. There is ordinarily no liability, upon an executor or administrator's bond, in behalf of a creditor, legatee, or distributee, until after a final decree in the probate court against such executor or administrator for the payment of the sum due such creditor, legatee, or distributee.¹⁸ And in an action upon such bond it is not * competent to show fraud in the recovery of the judg- * 94 ment against such executor or administrator, or that in rendering his account before the probate court he was guilty of fraudulent suppression of facts, thereby lessening the amount for which he was found liable.¹⁹

7. The ordinary bond for faithful administration is not intended to transfer the jurisdiction of questions connected with such administration from the appropriate and exclusive sphere of the probate courts to that of the common-law courts. But these bonds are designed to secure the enforcement of the decrees of the probate court, after they are rendered against the executor or administrator, whereby his breach of duty is established in the proper

v. Elliott, 3 Head, 507. But although, in general, one joint executor or administrator is not responsible for the default of the other joint executors or administrators, yet upon an action upon their joint bond it is competent to show the default of either. *Braxton v. State*, 25 Ind. 82; *s. p. Jeffries v. Lawson*, 39 Miss. 791; *Cannon v. Cooper*, id. 784; *Moore v. State*, 49 Ind. 558.

Where one becomes a second time administrator of the same estate, assets in his hands at the close of the first administration are presumed still to remain there at the time of his second appointment, and his sureties on the second bond will be held responsible for their faithful administration. *Whitworth v. Oliver*, 39 Ala. 286.

¹⁷ *Taylor v. Mygatt*, 26 Conn. 184.

¹⁸ *Probate Court v. Vanduzer*, 13 Vt. 135; *Williams*, Ch. J., in *Adams v. Adams*, 16 Vt. 228; *Ward v. Yonge*, 45 Ala. 474; *Thayer v. Clark*, 4 Abbott, App. Dec. 391. The condition of a bond given by persons interested in the estate of a deceased person to the administrator, to preclude the necessity of a license to sell real estate for the payment of debts, under Massachusetts General Statutes, ch. 102, § 9, is not broken until it has been ascertained by an account settled in the probate court that debts have been found due from the estate, and that the goods, chattels, rights, and credit of the deceased are insufficient for the payment thereof. *Studley v. Josselyn*, 5 Allen, 118.

¹⁹ *Paine v. Stone*, 10 Pick. 75. And the personal representative has no such interest in the putting his bond in suit as to be entitled to contest the order of the probate court directing it put in suit. *Bennett, Judge, v. Woodman*, 116 Mass. 518.

forum. Hence if the executor or administrator fails in the performance of the particular duties specified in the condition of the bond, the proper course for redress is to cite him before the probate court, and there compel him to render an inventory of all the effects of the deceased, and to administer the same in that court. For if redress is sought, by way of suit upon the bond in the first instance, nothing more than nominal damages can be recovered at most, since the recovery of damages by a particular claimant will not put the goods, omitted to be inventoried, in the way of administration. Or the executor or administrator may be cited, in the first instance, to render a final account of his administration, the term assigned by law having expired. In this mode a final decree of distribution may be obtained against the personal representative for the payment of debts and legacies, or the shares of distributees, as the case may be. And where upon such citation the personal representative fails to appear, the probate court will pass a decree against him, as by default. And in every case, after obtaining such final decree against an executor or administrator, the bond may be resorted to by way of suit in the common-law courts.²⁰

8. But it has been held,²¹ that where the administrator's * 95 bond, * in terms, and in conformity to the statute, requires the return of a true and perfect inventory of the estate, it will be good ground of action upon the same that no such inventory was made, or that it did not embrace all the estate. And it will be no sufficient bar to the suit that the administrator had settled his final account with the probate court, provided it does not embrace this identical portion of the estate. And the fact, that there was no specific property named in the account; but instead thereof it was stated that "the appraisers made no return of any

²⁰ *Adams v. Adams*, 21 Vt. 162; *French v. Winsor*, 24 Vt. 402. In the case of *Brush v. Button*, 36 Conn. 292, it was held that the executor's account cannot be settled in the appellate court in an action upon the bond, but that the probate court is the only place where it can be done. The case of *Fairman's Appeal*, 30 Conn. 205, and many others from that state, are here cited, as embracing the same principle. See also *Probate Court v. Kimball*, 42 Vt. 320. The doctrine of the text is fully indorsed by the national Supreme Court in *Beall v. New Mexico*, 16 Wall. 535; Mr. Justice *Bradley*, in giving the opinion, quoting the views here stated with approbation. *S. P. Judge of Probate v. Adams*, 49 N. H. 150; *Casoni v. Jerome*, 58 N. Y. 315.

²¹ *Moore v. Holmes*, 32 Conn. 553; *McNeel's Estate*, 68 Penn. St. 412.

personal property," is no sufficient ground for the construction that the probate court must have found that there was no property to be appraised.

9. And in some of the states it is held that where there is a technical breach of the administration bond, by not returning a perfect inventory, the persons having an ultimate interest in the estate as heirs, devisees, or creditors, may cause suit to be instituted upon the administration bond for their benefit, and in such suit may recover the value of that portion of the estate not inventoried.²² But this is certainly not in accordance with either principle or convenient practice.

10. But after any court having jurisdiction of the matter has determined the amount due the party in interest, and the probate court has also decreed the payment of the amount so found due, the party is in condition to enforce his remedy upon the administration bond.²³

SECTION III.

ADMINISTRATION WITH THE WILL ANNEXED.

1. Where no executor, probate court appoints administrator with will annexed.
2. Such person generally expected to administer upon all the estate not already administered.
3. The will to be proved the same as where an executor acts.
4. The residuary legatee generally entitled to the appointment.
5. And in case of his death his representative will be entitled.
6. The courts of probate in England may be controlled by writ of mandamus.
7. The more common remedy in America is by appeal.
- * 8. Where there is no residuary legatee, or he renounces, the next of kin * 96 entitled.
9. The administrator of deceased executor sometimes appointed.
10. Such administration during temporary absence of executor. The executor cannot be appointed to the office.
11. Law of domicile determines what is testamentary, but not who shall administer.
12. When administration will be granted to married woman without the consent of the husband.

²² *Blakeman v. Sherwood*, 32 Conn. 324; *Clark v. Cress*, 20 Iowa, 50. And the same course seems to be pursued in Massachusetts, in order, as it is said, to put the estate unadministered into the power of the judge of probate, that he may be enabled to secure its faithful application. *Choate, Judge, v. Arrington*, 116 Mass. 552.

²³ *Gandolfo v. Walker*, 15 Ohio, N. S. 251. See, post, § 48, pl. 27, 28, 29.

§ 9. 1. IN every case where a will exists, and from any cause there is no person to act as executor, the probate court appoints one, who is called an administrator with the will annexed. The duty of such appointee is much the same, in all respects, as that of an executor appointed by the will.¹

2. It has been held in some of the American states, that an administrator with the will annexed has no authority to administer upon any portion of the estate of the testator not disposed of by the will.² But we apprehend that, in general, according to the practice of the probate courts and in conformity with the statutes in the American states, an administrator appointed either because the office of executor has become vacant for any cause, or where a former administrator has deceased, or in any mode vacated the office, although in the former case he is denominated an administrator with the will annexed, and in both cases may be administrator *de bonis non*, will always be invested with the power of administering upon all the estate which remains to be administered. But there is no question the appointment of an executor or of an administrator with the will annexed, might be so limited as to require a distinct appointment to administer those effects not disposed of under the will. But we apprehend such is not the general intention or practice. There would be more propriety in this construction in regard to the office and duty of an executor who derives his appointment, in the first instance, from the testator, and who could not be appointed, strictly speaking, to administer any thing beyond the trusts created by the will.³

¹ 1 Wms. Exrs. 402. In the case of an executor named in the will, the Court of Probate cannot appoint an administrator with the will annexed, unless fully assured of the executor having declined, or, as the English courts denominate it, renounced the trust. The mere consent of the executor that the residuary legatee may take administration with the will annexed is not sufficient. There must be a formal renunciation by the executor, or non-appearance, within the prescribed period, after due citation. *Garrard v. Garrard*, L. R. 2 P. & D. 238. And in the ecclesiastical courts a formal citation was served upon the executor to appear and accept or renounce the office, before any one could be appointed in his place. But all that is required in the American practice is, that the court be fully assured of his renunciation, and this may be inferred from his conduct after being informed of his nomination in the will, without any formal communication from him. *Solomon v. Wixon*, 27 Conn. 520.

² *Harper v. Smith*, 9 Ga. 461.

³ *Hays v. Jackson*, 6 Mass. 149. It is here said by *Parsons*, Ch. J., if

* 3. The will in such cases is required to be proved in the * 97 same mode as if an executor existed,⁴ unless that had been done before the vacancy in the office of executor occurred.

4. The rule of practice in the ecclesiastical courts in regard to selecting administrators with the will annexed, where there are different claimants, and the statute⁵ does not control the matter, is to take the person having the greatest interest in the effects of the deceased, unless there are other considerations of a controlling character.⁶ The general rule in the English courts of probate seems to have been to give administration first to the party entitled

there be any undevise estate, real or personal, the executor may administer the same ex officio under the statute, and need not obtain letters for that purpose. And this we believe is the general practice in America.

⁴ 1 Wms. Exrs. 402. The occasions for appointing an administrator with the will annexed will readily occur to all. 1. Where no executor is appointed by the will. 2. Where such executor predeceases the testator. 3. Where for any cause he becomes incompetent to discharge the office, or renounces it. 4. Where, after having proved the will, he deceases before completing the administration. In this latter class of cases the administrator is also administrator de bonis non. So also, where the person named executor is limited to his age of majority, either by the terms of the will or the laws of the state, and has not yet arrived at full age, some one must act as administrator with the will annexed in the mean time. And there are other cases where a vacancy in the office of executor may exist, either temporarily or permanently, as where the person named executor is not to act until one year after the decease of the testator. *Graysbrook v. Fox*, Plowden, 275, 279, 281. In general, the duties of the executor wholly devolve upon the administrator cum testamento annexo, so far as they pertain to the settlement and distribution of the estate; but where there are special trusts devolved upon the executor beyond this, which are of longer duration and more strictly personal, those should be devolved upon a trustee specially appointed for that purpose either by the probate court or the Court of Chancery. *Farwell v. Jacobs*, 4 Mass. 634.

⁵ 21 Hen. 8, ch. 5, which extends only to the appointment of administrators in cases of intestacy, and where the executor declines to serve.

⁶ *Repington v. Holland*, 2 Cas. temp. Lee, 254; *Wetdrill v. Wright*, 2 Phillim. 243, 248; *Tucker v. Westgarth*, 2 Add. 352. It has been recently held in the English Court of Probate, that the universal legatee under the will must be treated the same as the residuary legatee, as to the right to take administration with the will annexed, either being entitled to administer, but the former not being entitled, any more than the latter, to be treated as a virtual executor of the will. *Oliphant in re*, 6 Jur. N. S. 256, explaining *Androvin v. Poilblanc*, 3 Atk. 301. See also *Scarborough in re*, 6 Jur. N. S. 1166; *Presant v. Goodwin*, 6 Jur. N. S. 404; *Bennet in re*, id. 326 N.; *Laneuville v. Anderson*, 6 Jur. N. S. 1260.

to the residue of the goods, and among those of equal degree,
 * 98 to the *one in seniority, other things being equal.⁷ But it
 is said, among several entitled to the residue, administration
 may be granted to either of them.⁸

5. And in the event of the death of the residuary legatee before
 full administration, his representative is entitled to the office of
 administrator with the will annexed, in preference to the next of
 kin of the testator, unless where the residuary legatee was a mere
 trustee, and in such cases the person beneficially interested will be
 entitled to administration.⁹

6. Where the statute expressly requires that administration be
 granted to a particular party, the courts of law in England will
 compel the ecclesiastical courts, by writ of mandamus, to appoint
 such party.¹⁰ But when the ecclesiastical courts have a discretion
 in regard to whom they will appoint, that discretion cannot be
 controlled by any other court.¹⁰

7. In the American courts of probate, where appeals are gen-
 erally allowed to the Supreme Court of the state, the proper remedy,
 in cases similar to those named in the last preceding paragraph,
 will be by appeal (and not by writ of mandamus), where the whole
 question may be carried before the Superior Court, involving mat-
 ter of discretion as well as of law.

8. Where a vacancy occurs in the office of executor, and there

⁷ Gill in re, 1 Hagg. 341. The residuary legatee is the testator's presumed
 choice, after the executor. *Atkinson v. Barnard*, 2 Phillim. 316; ante, § 7,
 pl. 9. But, where it appeared there was no residue, the court deemed it proper
 to grant administration to the next of kin, notwithstanding he had unsucces-
 fully contested the will. *Sawbridge v. Hill*, L. R. 2 P. & D. 219.

⁸ *Taylor v. Shore*, T. Jones, 161. But if granted to a widow it should be
 during widowhood, it is said. *Teed in re*, 7 Notes of Cases, 384; *Hand*
in re, 13 Jur. 663; *Thornton in re*, id. 1107; *Hampson in re*, Law Rep. 1 P.
 & D. 1. But a decree for separate living will not justify the court in passing
 by the widow without citation. *Ihler in re*, L. R. 3 P. & D. 50. The same
 rule obtains in America. *Matter of Kirkpatrick*, 22 N. J. Eq. 463.

⁹ 1 Wms. Exrs. 405.

¹⁰ *Rex v. Bettesworth*, 2 Str. 956; *Southmead in re*, 3 Curt. 28. But
 where the same person is both residuary legatee and next of kin, neither law
 nor practice, it has been said, will warrant a refusal to grant administration
 with the will annexed to such person. *Linthwaite v. Galloway*, 2 Cas. temp.
 Lee, 414; ante, § 7, pl. 11. The Court of Probate cannot pass by an executor
 by reason of his bad character. He must also be non-resident, when admin-
 istration with the will annexed may be granted to another. *Samson in re*,
 L. R. 3 P. & D. 48.

is no residuary legatee, or he renounces the appointment, it is customary to grant administration with the will annexed to the next of kin, as he will be the party primarily and chiefly interested in having faithful performance of the duty.¹¹

¹¹ *Kooystra v. Buyskes*, 3 Phillim. 531. Where there is neither residuary legatee nor next of kin of the testator to accept the office, administration with the will annexed may be granted to the legatees, or the next of kin of such legatees. *Hinckley in re*, 1 Hagg. 477. The order of preference to this office under the statutes in New York is as follows: 1. The residuary legatee. 2. General or specific legatees. 3. The widow. 4. The next of kin. 5. The public administrator. 6. Creditors. 7. Any other persons interested. *Matter of Ward*, 6 N. Y. Legal Observer, 111. The practice is by no means uniform in the American states, as to the person best entitled to administration with the will annexed. It is generally considered that the selection should be governed by different rules from those applied to administrations where no will exists, since the persons interested under the will will be the parties affected by the appointment, and will be first entitled to have the appointment, in the order of their interests. Hence, where all of the next of kin qualified to act renounce, the court may appoint the nominee of one of the next of kin. *Ellmaker's Estate*, 4 Watts, 34. It is here said, the husband of the next of kin is not entitled to administer as matter of right. It should appear by the petition for such an administration, that there is estate remaining unadministered. *Pumpelly v. Tinkham*, 23 Barb. 321. And the petition will not be denied upon the ground that the demands constituting such effects are barred by the statute of limitations. *Ib.* Such an administrator is required to execute the same bond as any other. *Ex parte Brown*, 2 Bradf. Sur. Rep. 22. Such administrator is bound to perform all duties imposed upon the executor, either by the general law or the special order of the court. *Bowers v. Emerson*, 14 Barb. 652. But such an administrator cannot compel the agent of the executor to account with him for moneys collected by him in his agency in another state, or even when collected in the same state, in regard to lands devised to the executor in trust and with a power of sale, since such agent is alone responsible to the executor and his personal representatives, and the administrator's only claim is against such executor, or his personal representatives after his decease. *Smith v. Edmonds*, 10 N. Y. Leg. Observ. 185. A power given by the will to the executor to sell real estate, cannot be executed by the administrator cum testamento, notwithstanding the statute, in terms, gives him the same powers conferred upon the executor, since that is regarded as limited to the administration of the personalty. *Conklin v. Egerton*, 21 Wendell, 430. See also *Gilchrist v. Rea*, 9 Paige, 66; *Matter of Place*, 7 N. Y. Leg. Observ. 217. But in the case of the *Matter of Anderson*, it is said the rule above stated only applies to cases where the power is connected with a special and personal trust in the executor. 5 N. Y. Leg. Observ. 302. But it seems that in all cases where there is a trust connected with the power in the executor, it cannot be performed by the administrator with the will annexed. *Dominick v. Michael*, 4 Sandf. 374; *Le Fort v. Delafield*,

* 99 * 9. It has been sometimes held that the administrator of a deceased executor should be appointed administrator with

3 Edw. Ch. 32. It is scarcely necessary to state that whenever the executor is removed and an administrator appointed in his place, the administration, in every respect, instantly devolves upon such administrator. A direction in the will, for the executor to sell real estate for the support of the widow, in a certain contingency, is clothed with a personal trust and duty, which ceases with the death of the executor. *Hunt v. Holden*, 2 Mass. 168. But in *Tainter v. Clark*, 13 Met. 220, 229, such a personal trust was held incapable of execution by the administrator with the will annexed, the executor having declined to act as executor. The court say he may accept and exercise such a personal trust, and thus become trustee under the will, while renouncing the office of executor. And in *Clark v. Tainter*, 7 Cush. 567, it was held the executor, having declined to act as such, might still act as trustee under the will, for the benefit of the person interested as cestui que trust of the avails of the sale, and thus validly execute the power of sale. And in *Greenough v. Welles*, 10 Cush. 571, it was recognized as a settled point, that the administrator with the will annexed could not execute any power in the executor, connected with a trust, such as are denominated, in the books upon that subject, trust powers; but such powers must be executed by the person to whom they were committed; and, in case of his decease or incapacity, a court of equity will decree their execution, or presume the transfer of the title in accordance with the trust, when that sufficiently meets the equity of the case. See post, § 68.

But where the authority or power conferred upon the executor by the will is one merely pertaining to the duties of the office of executors, even though it were a power of sale of the real estate for the payment of debts and legacies, there being no other trust connected with the power except to determine when the exigencies of the estate demand the sale, and upon what terms it shall be made, there seems to be no reason why the power may not be executed by the administrator with the will annexed; since it seems to pertain strictly to that office to execute all powers in the will which become indispensable in the settlement of the estate. *Shields v. Smith*, 8 Barb. 601. And this seems especially proper where the statute, as in many of the American states, gives the administrator with the will annexed "the same rights and powers," . . . "as the executor." 2 N. Y. Rev. Stat. 16, § 22, 2d ed. Or, in the language of Gen. Stat. Vermont, ch. 50, § 11, "shall have the same authority to perform every act, and discharge every trust," &c., as the executor. The fact that all the writers on powers concede, that, where the will gives a power of sale of real estate to pay debts and legacies, naming no donee, it may be executed by the executor, and even by the executor of the executor, because they, each in succession, have the duty of paying debts and legacies (1 Sugden on Powers, 6th Lond. ed. 133-139), shows very clearly that, in such case, the administrator with the will annexed may execute the power; and, if in that case, then equally where it is given to the executor as such. But the cases are not so. But see *Anderson v. McGowan*, 45 Alab. 462, which does so hold. So, also,

the * will annexed, there being no other claimant, because * 100 he will ordinarily be most likely to understand the state of the executor's account with the estate, and this, notwithstanding the possible apprehension, that he would not desire to urge forward to a speedy settlement all accounts where the balance should happen to be against the former executor.¹²

10. Such administrations may be granted during the absence of an executor, or where he resides in a foreign state.¹³ And in England, as the executor of a testator becomes, by accepting the office, executor of all persons of whom his testator was executor, he cannot escape that responsibility by taking letters of administration with the will annexed, after renouncing the office of executor.¹⁴ But in most of the American states no such question could arise, as by statute the executor of an executor is not *ex officio* executor upon the estate of the first testator.¹⁵

11. Where a foreign will is proved in the place of domicile of the testator, and afterwards brought into England to be there carried into effect by the probate court, that court will follow the action of the foreign court in determining whether the instrument is testamentary, but not in regard to the person to whom administration shall be granted. In a case where the testator, domiciled in the Isle of Man, deeded all his estate to a trustee, upon trust, after his decease, to pay the income to his widow during life and afterwards to distribute the property among his children, the foreign court decreed probate of the paper, as testamentary, it being

Gulley v. Prather, 7 Bush, 167; *Bird v. Matteson*, 54 N. Y. 663; *Pinney v. Barnes*, 17 Conn. 420. But where the executor has a discretion to increase an annuity to the testator's son, and renounces the office, such discretion being personal to the executor, cannot be exercised by the administrator with the will annexed. But a direction to the executor to hand over the corpus of the estate to the son at the age of thirty years, if in his opinion the son is then solvent, was held to be a direction dependent upon a fact judicially ascertainable, and that it might therefore take effect without the determination of the executor. *Hull v. Hull*, 24 N. Y. 647.

¹² *Neaves's Estate*, 9 Serg. & Rawle, 186. But where the administrator of the executor joins with another in taking letters upon the former estate with the will annexed, there is no transfer, by operation of law, of the property in his hands belonging to the first estate, to him as administrator *de bonis non*, since he does not fully represent both estates. *Thomas v. Wood*, 1 Md. Ch. 296.

¹³ *Cassidy in re*, 4 Hagg. 360.

¹⁴ *Bullock in re*, 1 Rob. 275.

¹⁵ *Ante*, § 6, pl. 17.

executed with due formality as a will, and gave administration to the trustee, as executor, according to the tenor. The Court of Probate in England recognized the deed as testamentary, according to the decree of the foreign court, and would have made the widow administratrix with the will annexed; but, in consideration of it being apparent that the testator designed to exclude her from all control over the administration, the court decreed it to the trustee,¹⁶ under the English statute.¹⁷

12. Where a married woman is sole legatee under a will not naming an executor, and the husband refused to consent to her taking administration with the will annexed, or to join in the bond, the property being left to her sole use, the court granted administration to her attorney, without the husband's consent.¹⁸ And where a married woman was the sole surviving residuary legatee, and the husband had covenanted, in the marriage settlement, that all property coming to the wife during coverture should go to her sole and separate use, and be at her absolute disposal, the court granted administration to her nominee, without notice to the husband.¹⁹

ADMINISTRATION DE BONIS NON.

1. The definition of an administrator de bonis non. The extent of his rights and duties.
2. Grounds of selection and the extent of his responsibility.
3. An administrator de bonis non cannot be appointed until the office is vacated.
4. The administrator de bonis non represents the estate to the fullest extent.
5. Such administrations not affected by statutory limitations upon original administrations.
6. Administration de bonis non because of insolvency.
7. Proceedings to call an administrator to account, if he decease, must be revived against his personal representative.
8. The extent of the responsibility of the administrator de bonis non.

§ 10. 1. AN administrator de bonis non is one appointed to administer that portion of the estate of a deceased person not

¹⁶ In the Goods of Cosnahan, 1 P. & D. 183; In the Goods of Earl, id. 450; Miller v. James, 21 W. R. 221; ante, § 30, Vol. I. Wills.

¹⁷ 20 & 21 Vic. ch. 77, § 73.

¹⁸ The Goods of Warren, 1 P. & D. 538.

¹⁹ The Goods of Pine, 1 P. & D. 388.

already administered. In England this did not always apply to the case of an executor who deceased after having proved the will and partially administered, the duty of completing the administration in such cases devolving upon the executor of the executor, if one had been appointed; the functions of the office being regarded as a personal obligation and duty of the first executor, which legitimately devolved upon his executor.¹

2. The administrator de bonis non is the sole representative of the estate, after his appointment, and, where a will exists, the appointment should be with the will annexed. But an administrator de bonis non does not succeed to any special trust reposed in the executor. And the cestui que trust cannot recover interest upon the trust fund of such administrator.² In the selection of an * administrator de bonis non courts of probate commonly * 102 follow the rules already indicated in the selection of administrators in the first instance, but the same are not absolutely binding in all cases.³ Where the Surrogate has a right to select between two or more claimants to the appointment of administrator, he may properly take into consideration the moral fitness of the respective persons,⁴ as we have before seen.⁵

3. Courts of probate may vacate the appointment of an administrator, and appoint another in his place de bonis non, but when such appointment is made without vacating the former appointment, it is of no validity.⁶

¹ Ante, § 6, pl. 17. Such an appointment must be made in every instance where goods remain unadministered. *Scott v. Fox*, 14 Md. 388.

² *Knight v. Loomis*, 30 Maine, 204; *Williams's Appeal*, 7 Penn. St. 259; *Hassinger's Appeal*, 10 Penn. St. 454. See also *Van Wyck in re*, 1 Barb. Ch. 565. Such an administrator derives his title from the decedent, and not from the former executor or administrator. *Commissioners of Foreign Missions*, 27 Conn. 344. His liability is therefore restricted to the goods remaining unadministered. There is no privity between such an administrator and his predecessors, nor is he responsible for any devastavit or default of theirs. *Alsop v. Mather*, 8 Conn. 584; *In re Small's Estate*, 5 Penn. St. 258. Such an administrator may maintain a writ of error on behalf of the estate, where the suit occurred in the time of his predecessor. *Dale v. Roosevelt*, 8 Cow. 333. The fact of the appointment of an administrator de bonis non raises the implication that a vacancy had legally occurred. *Gray v. Harris*, 43 Miss. 421. But see *Goodwin v. Hooper*, 45 Alab. 613.

³ *Russell v. Hoar*, 3 Met. 187.

⁴ *Coope v. Lowerre*, 1 Barb. Ch. 45.

⁵ Ante, § 7, pl. 17.

⁶ *Gasque v. Moody*, 12 S. & M. 153. And it may be granted more than

4. The administrator de bonis non has full right and authority to bring suit against the former representatives of the estate, whether administrators or executors, as well in regard to any of the assets of the estate which have come to their hands since the decease of the testator or intestate, as for debts due to, or other causes of action in favor of, the deceased, in his lifetime.⁷ And the title of such an administrator dates from the death of the decedent; and he may recover, not only upon causes of action in favor of the deceased in his lifetime, but equally for any such cause of action accruing after the decease in regard to the assets; * and he will not be estopped by any illegal act of the former representative of the estate.⁸

5. There is no absolute limit beyond which administration on the estate of a deceased person may not be taken, unless such limitation be fixed by statute. In Massachusetts, an original administration is limited to twenty years from the death of the testator or intestate,⁹ and similar provisions exist in some of the other states, but not generally, it is believed. But this limitation will not extend to an administration de bonis non, which has been granted after the lapse of a much longer period.¹⁰

6. There is one species of administrators de bonis non, resulting twenty years after the decease of the former one. *Bancroft v. Andrews*, 6 Cush. 493.

⁷ *Collard's Adm'r v. Donaldson*, 17 Ohio, 264. But, at common law, it has been said such administrator had no authority to call a former representative of the estate to account, that being left between the personal representative of the former executor or administrator and the Court of Probate. *Hardwick v. Thomas*, 10 Ga. 266; *Potts v. Smith*, 3 Rawle, 361. But in many of the American states special statutes enable the administrator de bonis non to represent the estate to the fullest extent, and to enforce all valid claims in favor of the estate, even those which will be valid in favor of creditors, although not enforceable, strictly speaking, either on behalf of the deceased or the former representatives of the estate, on account of some fraudulent connivance on the part of the one or the other. *Ib.*; *Shackelford v. Runyan*, 7 Humph. 141. The administrator de bonis non, although strictly not in privity with the former representatives of the estate as to any merely personal or private act, is generally bound by all legal acts of such representatives affecting the assets of the estate. *Duncan v. Watson*, 28 Miss. 187.

⁸ *Bell v. Speight*, 11 Humph. 451. ⁹ Gen. Stat. ch. 94, § 3.

¹⁰ *Kempton v. Swift*, 2 Met. 70; *Bancroft v. Andrews*, 6 Cush. 493; *Holmes ex parte*, 33 Maine, 577. The English courts adopt a similar rule of practice in regard to administrations de bonis non. *Kempe in re*, 17 Jur. 240; *Sparke in re*, *id.* 812. See also *Stevenson in re*, 13 Jur. 736.

from special statutory provisions in some of the states, not much analogous to any known at common law, or in the English practice. By the statute of Alabama,¹¹ and similar statutes probably exist in some of the other states, when the probate court has declared the estate insolvent, it is the right of the creditors to nominate a person, whom the court shall appoint administrator de bonis non, and upon their failure to make such nomination the court appoints some one to that office, in its discretion. And the person thus appointed may call upon the administrator in chief to account, in the probate court, for the assets in his hands, and if he obtains a decree may enforce it by attachment, and the fact that the administrator in chief was appointed before the passing of the statute will make no difference.¹² But in a case¹³ in England, the residuary legatee was preferred over the nominee of the creditors in a somewhat similar case.

7. Where proceedings are pending against a former administrator to hold him responsible upon the ground of maladministration, during which the defendant dies, his personal representative is the proper person against whom to revive the suit.¹⁴

8. An administrator de bonis non, as already intimated, is not responsible for the maladministration of his predecessor, but only for such goods as come to his own hands.¹⁵ And it is said in this case, that the weight of authority seems to be, that the administrator de bonis non can only call upon the representative of the former administrator for such goods as remained in specie unadministered, and not for any which had been wasted or converted into money.

¹¹ Ala. Stat. of 1843.

¹² *Long v. Easily*, 13 Ala. 239; post, § 48, pl. 27, 28, 29.

¹³ *Dimes v. Cornwell*, in re *Waters*, 2 Robert. 142.

¹⁴ *Leonard v. Cameron*, 39 Miss. 419.

¹⁵ *Carrick v. Carrick*, 23 N. J. Eq. 364. The doctrine of the text is fully maintained by the United States Supreme Court, in *Beall v. New Mexico*, 16 Wall. 535. It is here declared that the administrator de bonis non cannot sue the former administrator or his representatives for a devastavit, or for delinquencies in office; nor can he maintain an action on the former administrator's bond for such cause.

ADMINISTRATION DURING MINORITY.

1. Administrators during minority appointed where executors or next of kin not of full age.
2. Such appointment more commonly conferred upon the guardian of the infant.
3. Suits instituted by such administrator may be prosecuted after his office terminates.
4. Such administrator has for the time all the powers of a general administrator.
5. There is now no restriction upon their rights and duties, except as to time.
6. In bringing suits by them it is necessary to allege the continuance of their office.
7. Judgments against special administrators may be revived by *scire facias*.
8. The executor during minority is discharged by handing over the assets to the infant executor when he comes of age.
9. Where several executors are under age, the special administration ceases on either coming of age.
10. Power of sale given to executors or administrators may be executed by an administrator during minority.

§ 11. 1. WHERE the person or persons appointed executors are all under age it becomes necessary to appoint an administrator during the minority of such executors, which was, at the common law, denominated *durante minore ætate*.¹ Similar statutory provisions exist in some of the American states.² The same rule applies if the next of kin or other party otherwise entitled to administration is under age. The court are compelled to select some other one, either temporarily or permanently.

2. It seems to have been the practice of the ecclesiastical courts to grant administration, in the cases named above, to the guardian of the executor or next of kin thus disqualified by minority.³ And the same rule has been extended to the appointment of a foreign guardian of the executor, as administrator of the estate during minority.⁴ But in some cases where the estate is to be

¹ 1 Wms. Exrs. 419, 420. So long as there remains one executor of full age, he may act on the behalf of the estate. 4 Burn's Eccl. Law, 228; 1 Brownl. 46.

² Mass. Gen. Stat. ch. 94, § 6; 1 Wms. Exrs. by Fish, 419, n.

³ Brotherton v. Hellier, 2 Cas. temp. Lee, 131.

⁴ Sartoris in re, 1 Curt. 910. The Court of Probate appoints guardians to infants under seven years of age, in its discretion; but to minors, as they are generally called, above that age, it appoints upon the nomination of the ward,

held by * trustees for the heir, who is named executor, the * 105 court will appoint the trustees as administrators during the minority.⁵ And the guardian has been set aside on the ground of advanced age, being eighty-one, or where he was very poor.⁶ And where the person otherwise entitled to administration was a minor, but being a married man and a resident of Portugal, where such disability was removed by marriage, the grant was made to such minor.⁷ An executor at common law was competent to act at the age of seventeen years, and the matter is now regulated in England by statute.⁸ But in the United States, an executor or administrator is regarded as holding an important official trust, requiring the exercise of discretion, and therefore not competent to act during minority, and in many states there is no limitation upon the discretion of the courts of probate in selecting a substitute during the minority.⁹

3. It seems to have been sometimes questioned, whether a suit, either in law or equity, which has been instituted by the special administrator of any class, could be prosecuted by the lawful representative of the estate, after the special administration was determined.¹⁰ But it seems now well settled that any such suit, or any recognizance taken in the name of the special administrator may be prosecuted, either in the name of such administrator or in the name of the person representing the estate at the time, whether in the form of a distinct suit or by way of supplement to the original one.¹¹

unless there is some special objection. 1 Wms. Exrs. 420, 421. But in all cases the next of kin will be preferred as guardian, unless there is special objection. *Ib.* The husband may administer for the wife. *Ib.*

⁵ *Lovell & Brady v. Cox*, cited in *West v. Willby*, 3 Phillim. 379. So in the last case, where the property is not sufficient to pay debts, administration will be granted to a creditor in preference to the guardian.

⁶ *Ewing in re*, 1 Hagg. 381; *Havers v. Havers*, Barnard. 22, by *Hardwicke*, Chancellor.

⁷ *Countess Da Cunha in re*, 1 Hagg. 237.

⁸ 38 Geo. 3, ch. 87, § 6.

⁹ 1 Wms. Exrs. by Fish, 419; *Pitcher v. Armat*, 5 How. Miss. 288; *Ellmaker's Estate*, 4 Watts, 34; *Williams's Appeal*, 7 Penn. St. 260; *Bieber's Appeal*, 11 Penn. St. 157, 162; *McClellan's Appeal*, 16 Penn. St. 110. The guardian is bound to exhibit an inventory and an account. *Brotherton v. Harris*, 2 Cas. temp. of Lee, 131; *Taylor v. Newton*, 1 id. 15.

¹⁰ 1 Wms. Exrs. 425; *Coke v. Hodges*, 1 Vernon, 24; *Jones v. Basset*, Prec. Ch. 174.

¹¹ *Stubbs v. Leigh*, 1 Cox, 133.

4. And although it has been sometimes questioned, it seems now well settled, that an administrator during minority has all
 * 106 the * authority, for the time being, of a general administrator, and that the property of the assets is in him; and he may maintain trover for the same.¹² And it is his duty to manage the same in a prudent manner.¹³ So, too, he may assent to a legacy, be sued for debts of the deceased, and may retain for his own debt.¹⁴

5. In the former English practice these special administrations were granted under very stringent limitations as to the rights and functions of the appointee. But in the American practice, and the present practice in England, there is commonly no restriction upon the powers of the administrator during his continuance in the office, the only limitation being applied to the term of the appointment.¹⁵

6. As the office expires by its own limitation upon the executor coming of full age, it is generally regarded as proper, in declaring either against or in favor of such administrator, to allege that the executor is still under age; and especially is this required where the administrator is plaintiff, and where, by consequence, the intendments will be against him; and even where the action is brought against him, it is said, this being a matter specially within his knowledge, he shall be required to plead the expiration of his office, when that is relied upon by way of defence.¹⁶

7. A judgment against a special administrator may be revived against the person representing the estate, by scire facias, after the expiration of such special administration.¹⁷

8. There is a case in Modern Reports¹⁸ where the subject of

¹² 1 Wms. Exrs. 426, 427; Com. Dig. tit. Admin. F.

¹³ This is to be done by disposing of goods of a perishable character, as fat cattle, or grain, or any thing which may be the worse for keeping. And he may sell goods for the payment of debts. Prince's Case, 5 Co. 29 b; 1 Wms. Exrs. 427.

¹⁴ Roskelley v. Godolphin, T. Ray. 483.

¹⁵ Bac. Abr. Leases, I. 7; 1 Wms. Exrs. 428, and notes.

¹⁶ Carver v. Haselrig, Hob. 251; Walthall v. Aldrich, Cro. Jac. 590; Croft v. Walbanke, Yel. 128; Beal v. Simpson, 1 Ld. Ray. 409, by Powell, J. During the continuance of his office he is not responsible for any act as executor de son tort, and must render his account before the probate court the same as any other administrator. Lawson v. Crofts, 1 Sid. 57; Taylor v. Newton, 1 Cas. temp. Lee, 15.

¹⁷ Sparkes v. Crofts, 1 Ld. Ray. 265.

¹⁸ Brooking v. Jennings, 1 Mod. 174.

this section is considerably examined. It was there held by a *divided court, when the infant executor reaches his *107 age of majority, the executor *durante minoritate* may discharge himself, on a plea of *plene administravit*, by showing that he had surrendered all the assets to the infant executor when he came of age. But Justice *Atkins* said, "This special verdict does not maintain the defendant's plea of *fully administered*; for that cannot be pleaded unless all debts are discharged as far as the assets will reach."

9. Where there are several executors, all under age, and administration during minority is granted in consequence, it will cease upon any one of the executors coming of age.¹⁹

10. It was held in the recent English case of *Monsell v. Armstrong*²⁰ by Lord *Romilly*, M. R., that an administrator during minority might execute a power of sale given by the testator to his executors or administrators.

SECTION VI.

ADMINISTRATION PENDENTE LITE.

1. Such appointment may be made in all cases of controversy in regard to the administration.
2. He is the temporary instrument of the court. His duty after his office terminates.
3. His authority only extends to safe-keeping of assets. Not chargeable with interest.
4. In what cases and how far a court of equity interferes to preserve the estate.
5. The devisees have a right to become parties to the contestation of the will.
6. Reasons and ground of such appointment.
7. The interest of a surviving partner consulted.
8. Courts of equity decline appointing receiver when there is an administrator *pendente lite*.

§ 12. 1. AN administrator, during the pendency of litigation,¹ may be appointed in all cases where there is a controversy in regard to the right of administration, as well in the case of the executor named in a contested will as in the case of different claimants for the office of administrator.

¹⁹ Toller's Executors, 101, 102; 4 Burn's Eccl. L. 228.

²⁰ L. R. 14 Eq. 423.

¹ Lord *Raymond*, Ch. J., in *Walker v. Woollaston*, 2 P. Wms. 576, 589.

2. The general duty of such administrator is to represent the estate during the pendency of the litigation, and in the mean time to see that no detriment comes to the goods or effects of the estate.² He is merely an agent or officer of the court, and when

the litigation is determined he must relinquish his office,
* 108 and * surrender all the estate in his hands to the rightful representative.³

3. His authority merely extends to the collecting of the assets and preserving them, and not to investing or distributing them.⁴ He has no authority to pay legacies, but where he has done so, it gives an equitable claim for its allowance.⁵ As he has no authority to use the money of the estate, or to invest the same, he is not liable for interest during the controversy.⁶

4. Where the property belonging to the estate is in peril of loss, and there is no one appointed to represent the estate, the right of administration being in controversy, and the probate court not having appointed an administrator pendente lite, a court of equity will appoint a receiver to arrest or prevent inevitable loss, where the estate is of sufficient value, and the amount of apprehended loss such as to justify the expense of a receiver.⁷ And it seems that it will make no difference whether the occasion demanding the appointment of a receiver arises before any one has been appointed to represent the estate, or during the pendency of a controversy to annul letters of probate or of administration.⁸ But it is said, that the bill seeking the appointment of a receiver cannot also ask a discovery affecting the controversy,⁹ or pray that after the appointment of an administrator, and his being brought before

² 1 Wms. Exrs. 433, 434.

³ Graves in re, 1 Hagg. 313.

⁴ Gallivan v. Evans, 1 Ball & Beatty, 191.

⁵ Adair v. Shaw, 1 Sch. & Lef. 243, 254.

⁶ 1 Ball & Beatty, 191.

⁷ Rutherford v. Douglas, 1 Sim. & Stu. 111, n.; Rendall v. Rendall, 1 Hare, 152; Jones v. Frost, 3 Mad. 1; s. c. 1 Jac. 466; Watkins v. Brent, 1 My. & Cr. 97; Newton v. Ricketts, 10 Beavan, 525; Devey v. Thornton, 9 Hare, 229; Whitworth v. Whyddon, 2 Mac. & G. 52. See also Anderson v. Guichard, 9 Hare, 275. The pendency of a suit in the ecclesiastical courts for the recall of letters of administration is not of itself sufficient ground for the appointment of a receiver. Connor v. Connor, 15 Sim. 598. But a court of equity will not interfere with the due management of an estate by the executor or administrator, unless there is reason to apprehend injury to the rights of the complainant. Ashburn v. Ashburn, 16 Ga. 213.

⁸ Marr v. Littlewood, 2 My. & Cr. 454.

⁹ Wood v. Hitchings, 3 Beavan, 504.

the court, the rights of the parties may be declared by the court of equity, and the estate there administered.¹⁰ But a receiver will not be * appointed where the estate is claimed by parties deriving title independently of the estate.¹¹ * 109

5. Where the due execution of a will is controverted on appeal from the decree of the probate court, the devisees have the right to appear, as parties to establish it, although a special administrator pendente lite has been appointed and appears for the same purpose,¹² and the rule would be the same where no special administrator pendente lite had been appointed. In the language of *Dewey, J.*, in the last case referred to, the devisee "was a party in interest, and his right to appear and support the will was not affected by any proceedings of the judge of probate. His interest continued until the will was established in the probate court."

6. Administrations pendente lite are not granted in the English practice, upon motion merely, and without opportunity to contest them, except by consent of parties.¹³ Such appointments are made with reference to the nature and state of the property, and sometimes on account of the conduct of one or both of the parties. But, as a general rule, the nominee of neither party should receive such appointment. But that may be done out of regard to special fitness.¹⁴ But sometimes a joint administration pendente lite is granted to the nominee of both parties on giving a joint bond.¹⁵

7. But where the estate of the decedent consists of his share of a business in partnership, which the surviving partner continues to carry on, regard to the wishes of such survivor should be had in the appointment of an administrator pendente lite, unless a strong case is made that he is dealing improperly with the business.¹⁶

8. It is the practice of the courts of equity, at the present time, to decline appointing a receiver to preserve the property of estates in the course of administration, during the pendency of litigation, where there is an administrator pendente lite, since he is appointed

¹⁰ *De Feuchères v. Dawes*, 5 Beavan, 110. See *Frowd v. Baker*, as to costs of the bill for receiver, 4 Beavan, 76.

¹¹ *Jones v. Goodrich*, 10 Sim. 327.

¹² *Eliot v. Eliot*, 10 Allen, 357.

¹³ *Northey v. Cock*, 1 Add. 326.

¹⁴ *Young v. Brown*, 1 Hagg. 53.

¹⁵ *Stanley v. Bernes*, 1 Hagg. 221.

¹⁶ *Horrell v. Witts*, Law Rep. 1 P. & D. 103.

chiefly for that very purpose. And his statutory powers are commonly sufficient to accomplish that purpose.¹⁷

ADMINISTRATION DURANTE ABSENTIA.

- 1, and n. 2. Such administrations granted, in the first instance, during the absence of party first entitled.
2. But in the American practice, in such cases, a permanent appointment is made.
3. Under the English statutes such appointments made, to act only in suits in equity.
- n. 4. Cases where the presence or evidence of the personal representative is indispensable.
4. The declarations of the testator, unaccompanied by official acts, do not bind estate.

§ 13. 1. THE practice seems to have obtained in the ecclesiastical courts, where the executor or next of kin was not within the jurisdiction of the court, to grant a special administration, limited to the period of the absence of the party primarily entitled to such administration.¹ These appointments, *durante absentia* of

¹⁷ *Veret v. Duprez*, Law Rep. 6 Eq. 329. But an administrator *pendente lite* may be appointed where there is a receiver in equity; and parties interested in the estate as creditors may interfere for that purpose, although not parties to the litigation. *Tichborne v. Tichborne*, L. R. 1 Prob. & Div. 730. And where there is no administrator, the courts of equity may appoint a receiver, with leave to have the same person take general administration upon citing all parties interested before the probate court. *Mayer in re*, L. R. 3 P. & D. 39.

¹ *Clare v. Hedges*, cited Lutw. 342; s. c. 4 Mod. 14; *Slater v. May*, 2 Ld. Ray. 1071. Upon a question arising in the latter case, whether an administrator *durante absentia*, in bringing suit as such, must declare the fact of the continued absence of the executor or next of kin, and *Hodge v. Clare*, 4 Mod. 14, being cited to the contrary, and the Rolls being searched, it was found to contain the very averment which the court is reported to have held not important, showing that so far from the court having so decided, the question could not have arisen in the case, Chief Justice *Powell* well said, "See the inconveniences of these *scambling* reports; they will make us appear to posterity for a parcel of blockheads." The appointment of an administrator during the absence of the executor does not, upon the death of such executor, become absolutely void, but only voidable. *Taynton v. Hannay*, 3 Bos. & P. 26; *Hannay v. Taynton*, 2 Add. 505.

the executor or the rightful administrator, seem occasionally to have been made in the early times in the American states.²

* 2. But it is believed, that the present practice in this * 111 country, which is probably controlled, to some extent, by statute, is, where the executor is so situated, from non-residence or other cause, that he cannot conveniently administer the estate, to appoint a general administrator with the will annexed, who shall be the general and responsible representative of the estate within the jurisdiction. And the same rule obtains in the American practice as to the next of kin, who reside without the state; they are disregarded in the selection of an administrator, as a general rule. There may, no doubt, occur many cases where the American courts of probate appoint administrators and issue letters testamentary to non-residents through the solicitation of their authorized agents and attorneys. And in the large proportion of cases this will produce no inconvenience practically. But where, for any cause, it becomes important to institute suits, either in law or equity, against the representative of an estate, it is essential that he should be found within the jurisdiction of the court.

3. It was for this reason that the English statute³ was made, providing for the appointment of administrators *durante absentia*, where the executor or administrator had gone abroad, without the jurisdiction of the court; since the former jurisdiction of the ecclesiastical courts did not enable them to grant such special administrations, in cases where administration had already been granted, notwithstanding the residence abroad of the appointees. But this statute is, in terms, restricted to proceedings in equity, and the special appointee is only made to represent the estate in proceedings in equity.⁴ Personal representatives, appointed under this stat-

² *Willing v. Perot*, 5 Rawle, 264; *Brodie v. Bickley*, 2 id. 431. In *Willing v. Perot*, 5 Rawle, 264, where a resident of Calcutta died in 1812, possessed of stock in the American Funds, which he bequeathed to his sons upon various trusts, it was held, that a local administrator, cum testamento annexo *durante absentia*, was entitled to receive the funds in preference to those claiming under the foreign executor. These appointments in the English practice, at the present time, seem to be based upon special considerations, as that the party appointed *durante absentia* is chiefly interested in the contemplated future administration, and are strictly limited to the return of the executor or general administrator. Baynes in re, 7 Jur. N. S. 832.

³ 38 Geo. 3, ch. 87.

⁴ *Davies in re*, 2 Hagg. 79. The remedy here suggested is the one more

ute, represent the estate until the termination of the proceedings in equity, and do not become *functus officio* upon the return of the primary party entitled to administer,⁵ as in the case

* 112 * where one is appointed administrator *durante absentia* in the first instance.⁶

4. It seems to be considered that the declarations of an executor or administrator, unaccompanied by any official act, will not ordinarily be of the same force in binding the estate, as are his acts within the range of his duty.⁷

SECTION VIII.

OTHER LIMITED ADMINISTRATIONS.

1. Other instances of limited administration may exist.
2. Administration granted for the transfer of stock.
3. There may be a special and limited, at the same time there is a general administration.
4. Administration is often granted for the performance of a single act.
5. These restricted administrations are very little in use here.
6. Other cases of limited administrations.

§ 14. 1. THERE were in the practice of the ecclesiastical courts, many other special and limited administrations, not coming within any of the classes already defined. Thus, where the deceased declared, a few days before his death, that he had made his will, which was still in existence in India; it was held, by Sir *John Nicholl*, that it was proper to appoint one to represent the estate until the will could be transmitted to the court, which could not be regarded as an administration *pendente lite*, *durante absentia*, or *minoritate*, &c.¹

commonly adopted in the case of non-resident executors or administrators, — that of a power of attorney, which may be regarded as answering all ordinary purposes. But there are special cases where the demand for the personal representative being within the jurisdiction of the court is indispensable, as in bringing suits, and especially in proceedings for contempt and some others, carried forward by sequestration or attachment.

⁵ *Rainsford v. Taynton*, 7 Vesey, 460.

⁶ *Cassidy in re*, 4 Hagg. 360.

⁷ Lord *Denman*, Ch. J., in *Rush v. Peacock*, 2 Moo. & Rob. 162. And it will make no difference that he is sole devisee under the will. *Rhodes v. Seymour*, 36 Conn. 1.

¹ *Metcalf in re*, 1 Add. 343. It is common, too, where it appears that the

* 2. There was also a limited administration granted, in * 113 the course of the settlement of Sir T. J. Metcalfe's estate, involved in the case just cited, for the purpose of transferring certain stocks defined in the letters of administration.²

3. There are many cases in the English practice of grants of administration limited to certain specific effects of the deceased, while the general administration is committed to another,³ there being no incongruity in a double administration, where it is all under the direction of the probate court. But it is said that regularly no administrator of any portion of the estate within the jurisdiction of the court, and of course not unless it be within that jurisdiction, can be granted to any one so long as there is an executor capable of acting, since the executor is *universi juris hæres*.⁴

4. Administration in the English practice is granted for the single purpose of transferring a particular fund, every thing else in regard to the settlement of the estate being determined;⁵ so also to institute or defend proceedings in chancery.⁶ As the jurisdiction of the American courts of probate is limited to the state where located, they have no voice whatever in the question to whom administration of the effects in other states shall be committed. Such questions sometimes occur in England as to particular districts.

5. It may be said as a general thing, that these limited admin-

testator left a will, which cannot be found, to grant administration limited until the original will be found and brought into the registry. Campbell in re, 2 Hagg. 555. So also where the executor becomes insane, or otherwise legally incapacitated, the English courts grant limited administration to last only till the disqualification be removed. *Hills v. Mills*, 1 Salk. 36. The same course is there pursued in case of the temporary disqualification of the administrator. Phillips in re, 2 Add. 336, n. b. It may be committed to the residuary legatee with the will annexed. *Milnes in re*, 3 Add. 55. But where the administration is granted for the benefit of the lunatic, it is usually committed to the next of kin of the lunatic. *Evelyn ex parte*, 2 My. & K. 3.

² *Howell v. Metcalfe*, 2 Add. 348.

³ 1 Wms. Exrs. 454.

⁴ *Coswall v. Morgan*, cited 2 Cas. temp. Lee, 571.

⁵ *Biou in re*, 3 Curt. 739.

⁶ *Woolley v. Gordon*, 3 Phillim. 315; *Davis v. Chanter*, 14 Sim. 212; s. c. 2 Phill. C. C. 545, 549, 550; *Lowry v. Fulton*, 9 Sim. 104. In the case of such limited administrations, the parties are entitled to the general grant or representation as to the remainder of the estate. *Harris v. Milburn*, 2 Hagg. 62.

istrations seldom or never obtain in the American practice, the probate courts preferring, for the convenience and security of all concerned, to have the administration of the settlement of estates as simple as practicable. In some few of the states at an early day, the courts of probate adhered to the English practice, in regard to granting such restricted administrations.⁷ The right of a

testator to commit distinct portions of the settlement of his
 * 114 estate * to different persons, whether in the same or different countries, seems to have been recognized here.⁸ It has also been held in North Carolina, that a general grant of administration, during the pendency of a contest for the proof of a will is a nullity.⁹ And in Tennessee administrations limited to particular effects, or to the performance of a single act, may be granted.¹⁰

6. In the English practice where the will disposes of but a portion of the estate, administration of the remainder will be granted to the party entitled to the general administration of the estate, which in the case of bastards, who are filii nullius, belongs to the crown.¹¹ So also where the next of kin, at the time of the decease, was in New Zealand, on its appearing that an immediate representation was necessary to preserve the estate, an appointment was made of the sister of the intestate for the benefit of the next of kin, until he should return or his attorney should take the administration.¹²

⁷ Griffith v. Frazier, 8 Cranch, 9. ⁸ Hunter v. Bryson, 5 Gill & J. 483.

⁹ Slade v. Washburn, 3 Ired. Law, 557.

¹⁰ M'Nairy v. Bell, 6 Yerg. 302.

¹¹ Rhoades in re, Law Rep. 1 P. & D. 119.

¹² Cholwill in re, Law Rep. 1 P. & D. 192.

* CHAPTER IV.

* 115

THE REVOCATION OF PROBATE AND ITS CONSEQUENCES BY
DIRECT PROCEEDINGS FOR THAT PURPOSE, AND BY
APPEAL.

1. This can only be done by a formal decree of revocation, upon notice to the incumbent.
2. The former administration should not be vacated except upon clear grounds.
3. and n. 9. Enumeration of some of the grounds upon which it has been done.
4. The use and effect of a caveat filed in the probate court.
5. Letters of administration granted without jurisdiction are absolutely void, and may be wholly disregarded.
6. Prohibitions issued in England, but errors in the probate court are here corrected by appeal.
7. It seems to some extent unsettled, what are the consequences of vacating an administration.
 - (1.) All acts done under a void appointment are of no validity.
 - (2, and n. 22.) Grounds stated whereby an administration is made void, or voidable merely, and where acts done before its repeal will be held valid or wholly void.
 - (3.) An appointment appealed from is thereby vacated; not so of a decree of removal.
 - (4.) In all cases the expenses of the litigation, *bonâ fide* incurred, will be paid out of the estate.
 - (5.) The regularity of the appointment of an administrator, or executor, cannot be attacked collaterally.
8. The question examined by Mr. Justice *Gray*.
9. The subject carefully considered by Mr. Justice *Metcalf*.
10. Codicil may be proved after will has been proved.
11. Valid for transfer of real estate until revocation.

§ 15. 1. It seems to be well settled, that if administration be granted to the wrong person, claiming to be the party entitled to administer by law, either by personating the party entitled, or by adducing proof of such person having deceased, or renounced administration, or where the first person appointed proves incompetent; and, indeed, in all cases where for any cause it becomes important to supersede a former administration duly and formally granted, by the probate court having lawful jurisdiction in the case, it cannot be effected simply by the appointment of a new administrator. The former appointment should be first regularly vacated, and this can only be done by citing the actual in-

* 116 cumbent * of office before the Court of Probate making the appointment, and there obtaining a formal decree of revocation.¹

2. The grounds upon which an administration may be vacated are various, and the matter rests so much in discretion, that it becomes not a little difficult to define the precise line by which courts of probate should be governed in regard to such matters. It is obvious that it should require a much stronger case to justify the revocation of an administration once granted, than merely to show a sufficient preponderance against the party, to have originally justified his rejection, since the application for the removal implies a kind of impeachment, either of the competency of the appointee or the fairness of the proceedings in obtaining the original appointment, and any action which casts imputation upon the capacity or conduct of another should be supported by the clearest proof.² It has even been claimed that the Ordinary, having once granted administration, could not afterwards revoke or repeal it, for any cause; having once executed the power, it was claimed his authority thereby terminated.³ And in one early case a prohibition issued to the Ecclesiastical Court upon this ground.⁴ But it is now conceded that for good cause the ecclesiastical courts may repeal a grant of administration, and the temporal courts may judge of the sufficiency of the cause.⁵ The more common grounds for revoking an administration are, that it was obtained by fraud or surprise;⁶ or that the former appointee has become insane, or otherwise

¹ *Pratt v. Stocke*, Cro. Eliz. 315. In the case of Langley in re, 2 Robert. 407, where an administration had been granted to a woman, falsely swearing herself to be the wife of the deceased, after an attempt to serve her with notice, but without success, the appointment was vacated, or declared void, and a new grant made to the lawful widow.

² It has been said that, at common law, the repeal of letters of administration rested solely in the discretion of the Ordinary. *Brown v. Wood*, Aleyn, 36. But under the Stat. 21 Hen. 8, ch. 5, an administration once granted can only be repealed for just cause. *Grandison v. Dover*, Skinn. 155; s. c. 3 Mod. 23, 25; *Taylor v. Shore*, T. Jones, 161. And, in *Grandison v. Dover*, the court deny the right of the Ordinary, at common law, to repeal an administration without cause. And the person appointed to administer an estate cannot be heard to petition for revocation of his appointment. *Chamberlain in re*, L. R. 1 P. & D. 316.

³ *Fotherby's Case*, Cro. Car. 62, 63.

⁴ *Sands's Case*, 1 Sid. 179, 403; s. c. 1 Keb. 667, 683; T. Ray. 93.

⁵ 4 Burn's Eccl. Law, 401; *Harrison v. Weldon*, 2 Stra. 911.

incompetent.⁶ And in some cases it * has been held suf- * 117
ficient ground for vacating the administration, that the
appointee had left the state.⁷

3. In the American states the right of removal of executors, administrators, guardians, and other similar trustees or appointees of the probate court, is more commonly defined by special statutory enactments. In Massachusetts,⁸ it is provided, that "when any executor or administrator residing out of this state, having been duly cited by the probate court, neglects to render his accounts and settle the estate; or when an executor or administrator becomes insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the probate court may remove him." These may be regarded as substantially the grounds upon which such removals are commonly made, or profess to be made, in most of the American states. The last ground named may be regarded as virtually including all others, and as referring the question, practically to the discretion of the judge. In such cases there is great danger of abuse, unless the removing power is exercised with great wisdom and forbearance.⁹ But one who is squandering the

⁶ 1 Wms. Exrs. 511; Cohen's Appeal, 2 Watts, 175.

⁷ 4 Bac. Ab. 60; Branch Bank at Decatur v. Donelson, 12 Ala. 741; Hostetter's Appeal, 6 Watts, 244. But that is no sufficient ground of removal, where the executor at the time of his appointment was known to reside out of the state, and especially where the movement for his removal comes from the party against whom he has instituted a suit to recover a claim on behalf of the estate. Wiley v. Brainerd, 11 Vt. 107. The comments here of *Williams*, Ch. J., upon the general question of absence from the state as a disqualification, are very pertinent and judicious.

⁸ Gen. Stat. ch. 101.

⁹ It may be thought, sometimes, that it is a very slight matter, whether one is removed from such a trust or not, as the office is generally regarded as one of a thankless character, producing more vexation and embarrassment than compensation; and this is a very just ground of stating the question, upon the inquiry in regard to an appointment. But it may become a serious question, how far such a trustee should be removed from office, and thus virtually impeached, as for quasi incompetence, or maladministration, upon the mere ground that a majority of those who see fit to interest themselves in the matter, vote against him, or testify against him. Such a matter requires careful and patient scrutiny, and demands firmness and wise circumspection always; and especially in this country, where public clamor often goes for more than it is fairly worth, and not seldom lights upon men in responsible positions, quite as much because they are competent and firm in their course, as because of any defectiveness of administration.

estate,¹⁰ or who declines to inventory property which those
 * 118 * interested in the estate claim as part of it, and offer to
 give indemnity to so prove,¹¹ it has been held may justly be
 removed. So where an executor obviously and wantonly departs
 from the requirements of the will, thus knowingly violating his
 trust, he cannot properly be retained in office.¹² So the Court of
 Probate cannot issue letters to an executor until he give bonds as
 required by law.¹³ So where an infant had been improvidently
 appointed administrator, it was held proper to revoke the ap-
 pointment.¹⁴ And where probate of the will and granting of

¹⁰ *Newcomb v. Williams*, 9 Met. 525. An executor or administrator may
 be removed for a cause existing at the date of the appointment, as being evi-
 dently unsuitable for the office; but this must be shown to exist at the time
 of the removal, and it will not be sufficient to show its existence at the time
 of the appointment. *Drake v. Green*, 10 Allen, 124. One appointed merely
 to collect the estate is the mere officer or agent of the court, and removable
 at will. *Flora v. Mennice*, 12 Ala. 836.

¹¹ *Andrews v. Tucker*, 7 Pick. 250; but see *Richards v. Sweetland*, 6 Cush.
 324.

¹² *Chew v. Chew*, 3 Grant (Penn.), 289; see also *McCaffrey's Estate*, 38 Penn.
 St. 331.

¹³ *Heydock v. Duncan*, 43 N. H. 95; *Succession of DeFlecher*, 1 La.
 Ann. 20.

¹⁴ *Carow v. Mowatt*, 2 Edw. Ch. 57. But where administration had been
 taken under a misapprehension, the court declined to revoke it and grant the
 same to another, notwithstanding all parties in interest were desirous it should
 be done, upon the ground that administration properly granted could not be
 revoked on a mere suggestion that it would be for the benefit of the estate.
Heslop in re, 5 Notes of Cases, 2; s. c. 1 Robert. 457. The court itself may
 promote proceedings for the repeal of letters testamentary which they believe
 to have irregularly issued. *County Court v. Bissell*, 2 Jones, Law, 387. One
 appointed under misapprehension of the law, that he was solely entitled, may
 be confirmed by the Appellate Court, if no injury will result therefrom to the
 legal rights of the defeated applicant. *McBeth v. Hunt*, 2 Strobb. 335. In
 Pennsylvania, the act of 1832 made executors and administrators removable
 for the cause of lunacy or drunkenness, or on failure to give security for proper
 conduct, when required by the statute; and they cannot be removed for any
 other cause. It was therefore held, that an executor is not removable for
 having purchased the real estate of the testator at his own sale, but that it
 was proper to require him to give security; and upon his refusal to do so he
 might properly be removed. *Webb v. Dietrich*, 7 Watts & S. 401. And where
 the next of kin do not apply for administration, or fail to give the requisite
 security, whereby another person is appointed administrator, such next of kin
 cannot require the court to recall the appointment. *Stoker v. Kendall*, Busbee,
 Law, 242.

letters testamentary are *procured without proper notice, * 119 the same should be vacated.¹⁵ And there are many similar grounds upon which removals have been made. It is a matter very much controlled by statute in the different states.

4. It was common, in the ecclesiastical courts, to enter what is called a caveat against any action in the matter of granting or repealing administration, without notice to the party filing the same, and the same thing continues in the practice of the present Court of Probate in England, and is found in some of the American states. It is of no specific legal force in avoiding the action of the probate court, but is resorted to as a precaution against hasty and inconsiderate action, on the part of the court.¹⁶

5. Letters of administration, granted by a court having no jurisdiction, are absolutely void for all purposes, and may be so proved in any proceeding, although the question may only arise collaterally.¹⁷ The probate court may therefore, in such cases, where they have jurisdiction, wholly disregard any such irregular proceedings, and make a new grant of administration, although the former letters have not been repealed.¹⁸ But where the probate of a will had been improperly set aside, by a proceeding which was void, and administration irregularly granted, the acts of such appointee in the due course of administration are valid, and cannot be interfered with by a court of chancery.¹⁹

6. It was common in the English practice to grant prohibitions in the temporal courts against the probate courts proceeding improperly to vacate or repeal letters testamentary or of administration.²⁰ But in the American states an appeal is generally allowed, to the highest judicial tribunal of the state, upon all questions of law in probate matters, where even matters of judicial discretion may be revised, except so far as they are dependent upon matters of fact; and in some cases the whole case goes before the highest

¹⁵ Lawrence's Will, 3 Halst. Ch. 215; *Lees v. Brownings*, 15 Ala. 495; *Roy v. Segrist*, 19 id. 810.

¹⁶ *Trimlestown v. Trimlestown*, 3 Hagg. 243; 1 Wms. Exrs. 513, 514; *Ottinger v. Ottinger*, 17 S. & R. 142; *Wikoff's Appeal*, 15 Penn. St. 281-288; *Hanna v. Munn*, 3 Md. 230; *Cain v. Warford*, id. 454; *Compton v. Barnes*, 4 Gill, 55.

¹⁷ *Fisk v. Norvel*, 9 Texas, 13; *Langworthy v. Baker*, 23 Ill. 484.

¹⁸ *Barker, ex parte*, 2 Leigh, 719; *The People v. White*, 11 Ill. 341

¹⁹ *Ragland v. Green*, 14 S. & M. 194. ²⁰ 1 Wms. Exrs. 516, 517.

* 120 * court, by a general appeal directly into that court, upon the facts, as well as the law.²¹

· 7. There seems to be considerable controversy in the English books in regard to the consequences of the revocation of letters testamentary and of administration, and some of the early cases maintain doctrines upon the subject which seem not altogether defensible, upon principle. Instead of attempting to revise the cases at length, and thus solve the principles which now obtain in regard to the question, which, if we had ample space, would be preferable, we must content ourselves with a brief summary of the law as it now stands in the American courts.

(1.) There can be no question that the distinction between acts done under a void appointment, and those done under one merely voidable will apply to this matter. If, therefore, the appointment is absolutely void, the acts of the appointee can possibly be of no legal force. But we apprehend that many cases, where the appointments have been treated as void, are now, and especially in the American courts of probate, held merely voidable.

(2.) Thus, where an administrator is appointed, and it afterwards appears that a will exists, and an executor is named, or where probate of a will is made, and letters testamentary issue, and it subsequently comes to light that a later will exists, and a different executor is named, in all such cases it may be good ground for recalling the probate, or letters of administration. But, as the court had full jurisdiction, both of the subject-matter and of the particular cause, the appointment, while it remained unrevoked, cannot be regarded as void; nor can the recall or repeal of the appointment be fairly regarded as placing the appointees of the court in the same position as if the decrees had never existed. On the contrary, all acts done in the due course of administration, while such decrees remained in force, must be held entirely valid.²²

²¹ *State v. Mitchell*, 3 Brevard, 520.

²² *Bigelow v. Bigelow*, 4 Ohio, 138; *Kittredge v. Folsom*, 8 N. H. 98. The mere production of a will, which does not name an executor, will not, as matter of course, have the effect to revoke the appointment of an administrator. *Cook's Estate*, 3 Phila. 60. Letters of administration are not void because another may have a superior title to them. *Wilson v. Frazier*, 2 Humph. 30. And in Virginia it has been held, that a grant of administration, in a case where the state of facts was not such as to give jurisdiction of the particular

* (3.) There has sometimes been a distinction made in * 121 regard to the effect of the decree of an appellate court vacat-

case, is not void, but voidable only; nor can the rightful acts and fair dealings with such administrator, before his letters are revoked, be impeached. *Fisher v. Bassett*, 9 Leigh, 119. But this does not seem to us to be placing the question upon grounds entirely defensible, upon legal principle. It may be assumed, that in the great majority of such cases, both the appointee and those who deal with him as such, act in the most entire good faith. But the difficulty lies deeper than this. It is one of authority, rather than good faith. Had the executor or administrator in name, any legal authority for the time to act as such, and in that capacity to represent the estate? This will depend, not upon the correctness of the action of the court, or upon the good faith, either of its appointees, or those who confided in them as such, but upon the jurisdiction of the court. To this end it seems requisite, —

1. That the testator or intestate should be dead. For no court can have jurisdiction to administer upon the estate of a living man, in the capacity of executor or administrator. And it matters not how good reason there may be to regard and treat the person as deceased. He may not have been heard of for the space of half a century, in all the known places of his former abode. If he is still living, that fact will oust the jurisdiction of all courts of probate, and uproot the authority and nullify the acts of all executors and administrators in the settlement of his estate.

2. He must, at the time of his decease, have been domiciled, or else have had some estate, within the jurisdiction of the court. These two leading facts being conceded, the court acquires jurisdiction, both of the general subject-matter and of the particular cause. In other words, the first fact is requisite to give any court jurisdiction of the subject-matter, and the second fact, or facts secondly stated, are requisite to give the particular court jurisdiction of the particular cause. This being conceded, it matters not how irregular may be the proceedings of the court, or how absurd and incomprehensible its conclusions, they afford sufficient authority to cover the *bonâ fide* transactions of its appointees; and without this their wisdom, or learning, or justice, can afford no shield to those who have confided in them, without the limits of their lawful jurisdiction.

The mere fact of subsequent revocation does not affect valid acts already done. *Price v. Nesbit*, 1 Hill, Ch. 445. This question is decided by the Court of King's Bench in *Woolley, Exr. v. Clarke*, 5 B. & Ald. 744, as late as 1822, Chief Justice *Abbott* presiding, when it was held, that an executor of a prior will which was admitted to probate, and letters testamentary issued nearly two years before the probate of the later will, had no authority to dispose of the effects of the estate, stress being laid upon the fact of the executor of the earlier will knowing of the existence of the later will. And *Best, J.*, said that, "where a party obtains a judgment irregularly, which is afterwards set aside for irregularity, he is not justified in acting under it; but the sheriff is justified. Here, the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a

* 122 ing an * appointment of an executor or administrator, where it is made upon an appeal from the appointment, or on an appeal from a decree upon a petition for the removal of the executor or administrator. In the former case there never would have been a final appointment, and in the latter, the appointment having been finally made, would continue in full force until vacated by a final decree. In the former case it is common, in practice, for the courts of probate to make an appointment *pendente lite*. And in some of the states the statutes provide that the appeal shall not have the effect to prejudice the acts of the executor or administrator.²³ But, upon general principles, we apprehend, that where one is appointed administrator, or receives letters testamentary as executor, and an appeal is taken and the Appellate Court refuse to ratify the appointment, it thereby becomes void from the date of the appeal; but where an original application is made to remove an executor or administrator, and the same is carried into the Appellate Court, and a decree of removal finally obtained, it operates only from

creditor who paid him a debt while the letters of administration were unrepealed, would be protected." The first letters testamentary were revoked in this case upon citation, and the distinction here alluded to between a judgment reversed for error and for irregularity (*Philips v. Biron*, 1 Strange, 509), if it exist at the present day, is scarcely applicable to the case of a recall of letters testamentary. We think the case of *Woolley v. Clarke* would scarcely be attempted to be maintained at the present day, unless the first letters testamentary could be regarded as void, or obtained in bad faith. And there seems no difficulty in arguing the good faith of the executor of the first will, as there are many cases where a will of an earlier date proves to be the last legal and valid will of the testator. We think the fairest conclusion, upon consideration of all the cases is, that unless there is a defect of jurisdiction in the court, or a fraud practised in obtaining letters testamentary or of administration, they could scarcely be regarded as conferring no authority upon the appointee, while he was fairly justified in acting under them. In *Patton's Appeal*, 31 Penn. St. 465, where a later will was brought to light after letters testamentary on an earlier will had been granted, and the later will was seriously contested and finally established, the court say, the first executor, during the litigation, was to be regarded as an administrator *pendente lite*. See also *Foster v. Commonwealth*, 35 Penn. St. 148.

²³ Pennsylvania Act of 1832, 1 Wms. Exrs. by Fish, 523. The distinction alluded to in the text between the effect of a decree on the application to appoint or to remove an executor or administrator, as suggested by Mr. Fish (1 Wms. Exrs. 522, in note), seems not to have been adverted to by the learned judge, in his criticism of Toller in the case of *Peebles's Appeal*, 15 S. & R. 39.

the date of the decree, and all acts done under the appointment before that date will be held valid.²³

* (4.) But even in cases of appeal from the decree of * 123 probate of a will and granting letters testamentary, and a final decree against the will, the executor will be allowed the expenses of the litigation *bonâ fide* incurred in attempting to support the will.²⁴

²⁴ *Bradford v. Boudinot*, 3 Wash. C. C. 122; *Ammon's Appeal*, 31 Penn. St. 311. See also, upon the general question of allowing the costs of both parties, out of the estate in a *bonâ fide* litigation in regard to the validity of a will, *Clapp v. Fullerton*, 34 N. Y. 190; *Girard v. Babineau*, 18 La. Ann. 603; *Browne v. Rogers*, 1 Houst. 458. But where the litigation is carried on by appeal and fails, costs will not be allowed out of the estate. *McKnight v. Wright*, 12 Rich. Eq. 229. See also *Smith v. Kennard*, 38 Ala. 695. And where the court are of opinion that the party offering a testamentary paper for probate has conducted himself improperly, they will charge him with the costs of the attempt to establish it. *Seaman's Friend Society v. Hopper*, 33 N. Y. 619. In administration suits in equity, costs on both sides, as between attorney and client, are commonly allowed from the residuary estate. In *re Tann v. Tann*, Law Rep. 7 Eq. 436. Where the personal estate has been exhausted, costs will by courts of equity be ordered paid out of the real estate, in the due order of administration, that which is specifically devised being last chargeable. *Row v. Row*, V. C. J., Law Rep. 7 Eq. 414. But in some of the states it is held optional with the executor whether he will incur expense in defending the will; and he must do it, at the peril of losing his costs and disbursements, if the same is not established. *Kelly v. Davis*, 37 Miss. 76; *Mumper's Appeal*, 3 Watts & Serg. 441; *Royer's Appeal*, 13 Penn. St. 569. The probate court, upon general principles, has no power to allow costs out of real estate, that being beyond its jurisdiction. *Young v. Dendy*, 1 P. & D. 344. But costs rendered necessary to establish the will, or to test its validity, are commonly allowed out of personalty, if sufficient. And the English Court of Probate will not condemn the next of kin in the payment of costs, where he has unsuccessfully contested the will, if done upon probable grounds of success; as where he was informed by one of the witnesses, the testator's medical attendant, that when the will was read over the testator signified his assent by gesture only, and that he could not swear that the testator was of sound mind. *Tippett v. Tippett*, L. R. 1 P. & D. 54. But where the court thought that the statement of the witness impeaching the due execution of the will was unfairly obtained, the party contesting upon the faith of it, and failing, was condemned in costs. *Bone v. Whittle*, L. R. 1 P. & D. 249. Where the will was in favor of strangers, and the next of kin contested it, upon evidence of management and unfair dealing with the testator, but to an extent, as it proved, short of invalidating the will, the costs of the unsuccessful opposition were allowed out of the estate. *Goodacre v. Smith*, L. R. 1 P. & D. 359; *Smith v. Smith*, id. 239. The heir-at-law, against whose interest a will is made, may intervene in the

(5.) It is scarcely necessary to state that the regularity of the appointment of an executor or administrator cannot be collaterally drawn in question in any action brought by them. It can only be done by some proceeding brought directly to operate upon the question of appointment or removal. This is a principle universally recognized in all judicial proceedings.²⁵

8. The question of the powers of probate courts in the State of Massachusetts, and incidentally throughout the country, and in

suit for testing the validity of the same between the executor and next of kin; and if the will is defeated in this suit, he will be entitled to recover his costs of the executor, or parties propounding the will for probate, the same as if he had instituted separate proceedings for testing the validity of the will. *Rayson v. Parton*, L. R. 2 P. & D. 38. Where the conduct of the testator, near his decease, led the unsuccessful party to contest the will, costs will be allowed out of the estate. *Du Boison v. Maxwell*, 21 W. R. 575.

In *Orton v. Smith*, L. R. 3 P. & D. 23, the will was unsuccessfully contested, on the plea of undue influence and fraud; and still the court allowed the contestant his costs out of the estate, being of opinion that the manner in which the testator executed the will (the signature being patched and altered), and the conduct of the persons beneficially interested, had reasonably excited doubt and suspicion, so that the contestant was justified in interposing the pleas he did. The Judge Ordinary, Sir *J. Hannen*, said: "I understand the rule as to costs to be, that if the circumstances are such as to justify the litigation, then this court, going further than other courts, is in the habit of allowing the party who has entered into a litigation, which it considers reasonable and justifiable, to have his costs out of the estate." In *Davies v. Gregory*, L. R. 3 P. & D. 28, it was held, that the costs of an unsuccessful opposition to the will must be paid out of the estate, in cases where the testator, by his own conduct, and habits, and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity. But in cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity; but the opponents of the will, after due inquiry into the facts, entertained a bonâ fide belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is not successful, each party must pay his own costs.

²⁵ *Emery v. Hildreth*, 2 Gray, 228. This rule will not apply, where the appointment is void, for want of jurisdiction in the court, since such an appointment is of no validity for any purpose. Ante, pl. 5. In one case, *Goodell v. Pike*, 40 Vt. 319, it was held that a court of equity will decree the property of an infant deceased to the proper heir, notwithstanding the will of the decedent had been proved and allowed in the probate court, an infant having no capacity to make his will and the probate having been surreptitiously obtained. But the form of the remedy was not much discussed.

England, is elaborately and learnedly examined by Mr. Justice *Gray* in a recent case, and the conclusion reached, that the decrees of that court in regard to the probate of wills are always, within reasonable limits of time, subject to revocation or modification, * upon the discovery of new and important facts, * 124 essentially affecting the basis of such decrees, although not fraudulently withheld at the time of the decree passing.²⁶

9. In an earlier case²⁷ it was held, that a judge of probate had no authority to revoke a decree passed by himself, making an allowance to a widow out of her husband's estate, and to pass a new decree giving her a less sum. The limitations and qualifications of the power of the probate court in revoking their decrees are here very carefully and justly stated by Mr. Justice *Metcalf*.²⁸

²⁶ *Waters v. Stickney*, 12 Allen, 1; ante, § 3, pl. 25.

²⁷ *Pettee v. Wilmarth*, 5 Allen, 144.

²⁸ "On the first of December, 1860, the judge of probate decreed an allowance of three hundred dollars to this appellant, — the widow of Benjamin Pettee, — and that decree was duly recorded. Two or three weeks afterwards, the administrator of said Pettee's estate, instead of appealing from that decree, made an application to the judge for a revision of it, and a reduction of the amount of that allowance. This application was dismissed — and rightly. Upon a second application, made by one of the heirs of said Pettee, six months after the decree was made, that decree was revoked, and a new decree passed, which allowed the appellant only fifty dollars. From that decree this appeal is taken by the widow. And the court are of opinion that the judge of probate had no authority to revoke his former decree and pass another. This last decree is therefore to be reversed. It is no objection to a reversal, that the decree was unauthorized and void. It is better that it should at once be reversed, than that it should hereafter be adjudged to be void, in some future proceeding in the settlement of the deceased's estate. *Commonwealth v. O'Neil*, 6 Gray, 343, 346; *Sturges v. Peck*, 12 Conn. 141, 142. When it was passed, the appellant had, of record, a vested right to the allowance first decreed to her. And though the judge had authority, on good cause being shown, to decree her an additional allowance (*Hale v. Hale*, 1 Gray, 518), we know of no authority which he had to rescind the decree that he had already made. If he could rescind his first decree, he might rescind the second, and so on indefinitely; and there could be no certainty that any decree had finally established any party's rights, but every person, in whose favor a decree had been ained, would hold it precariously at the discretion of the judge who passed it. f. 34 "There are cases in which our statutes have made provision that a judge of probate may revoke his decrees. By Gen. Sts. ch. 98, § 12, 'when an account is settled in the absence of any person adversely interested, and without notice to him, the account may be opened, on his application at any time within six months thereafter; and upon the settlement of any account by an executor or

* 125 * 10. The probate court, after admitting a will to probate and after the time for appeal has passed, may admit to probate a codicil to the same, written upon the back of the will, on the ground that the codicil escaped attention, and was not passed upon at the time of the original probate.²⁹

11. Where, upon the probate of a will in New York, where the testator was domiciled, a copy of the probate was carried into Louisiana, and there properly established in the probate court of the

administrator, all his former accounts may be so far opened as to correct any mistake or error therein ; except that any matter in dispute between two parties, which had been previously heard and determined by the court, shall not be again brought in question by either of the same parties, without leave of the court.' And by ch. 117, § 24, 'any warrant or commission for the appraisal of an estate, for examining the claims on insolvent estates, for the partition of real estate, or for the assignment of dower or other interests in real estate, may be revoked by the judge for sufficient cause ; and he may thereupon issue a new commission, or proceed otherwise, as the circumstances of the case shall require.' Except in these cases or others, if there are any specially provided for by statute, a decree of a judge of probate is to stand, unless it is reversed or reformed on appeal to this court, or is adjudged to be void in some collateral proceeding.

"When a judge of probate on hearing an application for a decree, refuses to pass it, for want of sufficient evidence that it ought to be passed, such refusal does not prevent him from passing it on a new application supported by the requisite evidence of its necessity or expediency. *Bucknam v. Phelps*, 6 Mass. 448. But when authority to act is conferred by law, there is a manifest difference in the legal effect of an act done under that authority and a single or repeated refusal to act under it. In the former case, the authority is exhausted by the exercise of it; in the latter, it is retained for future exercise."

²⁹ *Waters v. Stickney*, 12 Allen, 1. But in the late case of *The Goods of W. Harris*, 18 W. R. 901, where the testator made two wills, one of his property in Tasmania and the other of his property in England, and the latter only was admitted to probate in the place of the testator's domicile in England, and the former being refused probate in Tasmania, on the ground that a man could have but one will, and that both should therefore have been included in the probate in England, the court revoked the former probate, and granted probate of both wills as together constituting the testamentary act. So, too, probate of a codicil made in Scotland, confirming a will in India, the testator delivering a copy of the will to the executors at the time of executing the codicil, was granted, and the copy treated as part of the codicil, and as together constituting the testamentary act. Where two wills are presented, and no evidence which was executed latest, the court may act upon the internal evidence afforded by the instruments. *Goods of Sophia Stephens*, 18 W. R. 528. See *Forman's Will*, Tucker, Sur. Rep. 205.

latter state, it was held to form the proper and valid basis for the conveyance of the title of real estate within that jurisdiction, by a devisee under the will, although subsequent to the sale the original probate was reversed, on appeal to the supreme court in New York.³⁰

³⁰ *Foulke v. Zimmerman*, 14 Wall. 113.

THE ESTATE OF THE EXECUTOR OR ADMINISTRATOR IN THE
ASSETS OF THE ESTATE.

SECTION I.

WHEN THE TITLE VESTS.

1. The English books distinguish between the title of an executor and an administrator, in this respect.
2. For most purposes this distinction is of no practical importance.
3. The exceptions are, where it would operate to produce injustice, by holding the title the same.
- 4, and n. 8 and 12. The American courts follow the rules deduced from the English cases.

§ 16. 1. THE English books make a distinction between the time of the vesting of the estate of an executor and that of an administrator. The former, being under the will, is regarded as dating from the death of the testator, and that of the latter as dating only from his appointment.¹ *Abbott*, Ch. J.,² says: "There is a manifest distinction between an administrator and an executor. An administrator derives his title wholly from the Ecclesiastical Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death." It was held, in an early case, that an executrix may declare in ejectment upon a demise before probate.³

¹ *Whitehead v. Taylor*, 10 Ad. & Ellis, 210, citing 4 Vin. Ab. 1, Bailiff, D. pl. 7, Godbolt, 109.

² *Woolley, Exr. v. Clarke*, 5 B. & Ald. 744, 746.

³ *Roe v. Summerset*, 2 W. Bl. 692. But this decision went upon the same ground as all others, both before and after, that the probate of the will having relation back to the time of the decease of the testator, rendered valid all the intervening acts of the testatrix.

* 2. But we apprehend, that for most purposes this distinction between the time of the vesting of the title or estate of an executor and that of an administrator has become of no practical importance. For it is now settled, beyond all question, that the title of the administrator, after his appointment, vests from or relates back to the death of the intestate. Thus he may maintain trover or trespass for acts done before his appointment and after the death of the intestate.⁴ So he may also waive the tort and recover the money resulting from a transaction ;⁵ or he may ratify a contract made by procuration, or in any other form, before his appointment, on behalf of the estate, so as to take the benefit of it, the same as if his authority had been of a date anterior.⁶ So also as to leasehold estate belonging to the intestate, the title of the administrator has such relation back as to enable him to maintain all actions for the recovery of rent or other dues to the estate, from the death of the intestate ; and so as to render him liable to account for the rents and profits of it from the same period.⁷ The same rule applies to evictions and rights of entry accruing to the estate before the appointment of the administrator.⁸

⁴ *Tharpe v. Stallwood*, 5 M. & Gr. 760 ; *Foster v. Bates*, 12 M. & W. 226, 233, by *Parke*, B. But this rule does not apply to goods held by the deceased in a representative capacity, the title to which has devolved upon another. *Elliott v. Kemp*, 7 M. & W. 306.

⁵ *Welchman v. Sturgis*, 13 Q. B. 552.

⁶ *Foster v. Bates*, 12 M. & W. 226 ; *Bodger v. Arch*, 10 Exch. 333.

⁷ Lord *Ellenborough*, Ch. J., in *Rex v. Horsley*, 8 East, 405, 410.

⁸ 1 Wms. Exrs. 558, and note, by Fish. But rents accruing after the decease of the intestate belong to the heir, where the estate is exclusively of the realty. *Stinson v. Stinson*, 38 Maine, 593. And a payment of such rent to the administrator will be no discharge as against the heir. *Haslage v. Krugh*, 25 Penn. St. 97. The personal representative cannot maintain an action to recover possession of real estate except in those states where it becomes assets in his hands for the payment of debts. *Stillman v. Young*, 16 Ill. 318 ; *Aubuchon v. Lory*, 23 Mo. 99 ; *Smith v. McConnell*, 17 Ill. 135 ; *Foltz v. Prouse*, id. 487. But the title of a mortgagee vests, at his decease, in his personal representative, and a quitclaim deed from the heir conveys no title before foreclosure. *Taft v. Stevens*, 3 Gray, 504. The title of an administrator to the real estate of his intestate vests only from the decree of insolvency, and does not relate back to the decease of such intestate, as in case of personalty. *Lane v. Thompson*, 43 N. H. 320. But in the case of an executor, even before probate of the will, he has the title to all the personalty as trustee for the legatees, creditors, and others, and he is the only representative of the estate. *Lane v. Thompson*, *supra* ; *Shirley v. Healds*, 34 N. H. 407 ; *Dawes*

* 128 * 3. But there are some exceptions to the general fiction of law, by which the title of the administrator is regarded as having relation to the death of the testator. The period of the statute of limitations, so far as the administrator is concerned, begins to run only from the time of the actual appointment, since there could be no laches before.⁹ And in detinue, as the action goes upon the ground of an actual detainer in specie at the time of bringing the action, the action cannot be maintained, it is said, unless the defendant continued to hold the chattel after the date of the plaintiff's appointment.¹⁰ And perhaps it is safe to affirm that this relation of the title of the administrator to the date of the decease of the intestate, as it is made to prevent injustice and the occurrence of injuries where there would otherwise be no remedy, will only be applied in those cases where it will subserve the ends of justice, and never where it could have the opposite tendency.¹¹

4. The American cases, for the most part, follow the doctrines already stated as obtaining in England, as to the time of the accruing of the title of the personal representative, whether it be an executor or administrator.¹² The doctrine is briefly and per-

v. Boylston, 9 Mass. 337; *Clapp v. Stoughton*, 10 Pick. 463. The letters of administration are regarded as the foundation of the authority of an administrator, but in the case of an executor, merely as authentication of such authority. *Shaw*, Ch. J., in *Rand v. Hubbard*, 4 Met. 252, 256. And no act of an administrator before his appointment can be given in evidence against him in an action on behalf of the estate. *Gilkey v. Hamilton*, 22 Mich. 283.

⁹ *Murray v. E. I. Co.*, 5 B. & Ald. 204; *Pratt v. Swaine*, 8 B. & Cr. 285.

¹⁰ *Crossfield v. Such*, 8 Exch. 825. A plea of the statute of limitations, depending upon lapse of time after the decease of the intestate, should aver the existence of an administrator, it is said. *Benjamin v. DeGroot*, 1 Denio, 151; *Judge of Probate v. Hairston*, 4 How. (Miss.) 242.

¹¹ *Morgan v. Thomas*, 8 Exch. 302; *Leber v. Kauffelt*, 5 W. & S. 440.

¹² *Lawrence v. Wright*, 23 Pick. 128; *Admr. of Bullock v. Rogers*, 16 Vt. 294; *Rockwell v. Saunders*, 19 Barb. 473; *Johns v. Johns*, 1 McCord, 132; *Seabrook v. Williams*, 3 id. 371. The letters of probate or of administration are not necessary to be proved in the trial of an action upon the general issue in favor of an executor or administrator, unless the plaintiff declares upon his own seisin as executor or administrator, or upon some title which accrued to him as such. In such latter cases, the authority of the personal representative becomes part of his title to maintain the action. But in all cases where he depends upon a right or title accruing to the deceased, his right to sue in

tinently * stated in *Jewett v. Smith*¹³ by *Parker*, Ch. J.: * 129
 “The property may be considered in abeyance until administration is granted, and is then vested in the administrator, by relation, from the time of the death.”

SECTION II.

THE NATURE AND EXTENT OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR. DUTY AS TO CONVERTING ESTATE INTO MONEY.

1. The executor or administrator may hold the assets in his own right, or en autre droit.
2. The primary presumption is that he holds them en autre droit. He who claims the contrary, therefore, must prove it.
- 2 a. and n. 2. The various modes in which this may be done.
3. Assignees in bankruptcy or creditors cannot ordinarily hold them. But lapse of time and acts of ownership will change the estate.
4. A term not allowed to merge, to the detriment of the estate.
5. The marriage of an executrix will not transfer assets in her hands to her husband.
6. An executor who is residuary legatee will become owner after debts secured.
- 6 a. The duty of the personal representative in regard to converting property into money.
- 6 b. To justify a decree for sale of real estate, must appear to be necessary.
- 6 c. The form and manner of proceeding therein.
- 6 d. Irregularities, how cured.
7. The executor or administrator has no title to real estate, except sub modo.
8. In Massachusetts and most of the states the personal representative has no claim to the possession of real estate.
9. The executor may dispose of it by power under the will, but this is personal to himself.
10. Some of the states by statute and construction allow the administrator to recover for the heirs.
11. How far the personal representative may recover upon the bare possession of the deceased.

§ 17. 1. THE nature of the estate of an executor or administrator, in the assets of the deceased is, in some respects, peculiar, and

his capacity as executor or administrator is conceded, unless it be denied by special plea. *Clapp v. Beardsley*, 1 Vt. 151; *Aldis v. Burdick*, 8 Vt. 21.

The general doctrine of the vesting of all personal property in the personal representative of the deceased from the date of the decease, is held in the following cases. *Beecher v. Buckingham*, 18 Conn. 110; *Roorbach v. Lord*, 4 Conn. 347; *Ladd v. Wiggin*, 35 N. H. 421; *Seabrook v. Williams*, 3 McCord, 371.

¹³ 12 Mass. 309.

not always capable of exact definition. The property is, in
 * 130 * the first instance, always a special and limited one. But
 as the executor and administrator have the right to sell and
 dispose of any portion of the assets, or to convert them to their
 own use, thus making themselves chargeable for the amount, and
 subjecting them thus converted to the same incidents and liabilities,
 in all respects, as if they had never belonged to the estate of the
 deceased, it becomes important to consider the question in these
 two aspects.¹

2. The personal representative of the deceased, in the first
 instance, and until there has been some change in his mode of
 holding the assets, must always be treated as holding them en
 autre droit, and not in his own right. It is therefore incumbent
 upon any one who would attach a right to these assets, in the hands
 of the executor or administrator, or set up a title derived from them
 or either of them, in his private and personal capacity, to show,
 that the executor or administrator had ceased to hold them in his
 representative capacity. This may be shown in various modes.

2 a. This may be done by proving a sale, by the executor or
 administrator, in the ordinary mode, since such personal represent-
 atives of the estate have always, by virtue of their appointment,
 as such, a full power of sale over all the effects of the deceased ;
 and any title derived from them by way of purchase is of the same
 force and validity, precisely, as if they were the absolute owners
 of the same,² with the single exception, perhaps, of a collusive
 sale, made by the executor or administrator, to convert the assets
 of the estate to his own use, and thus defraud the creditors or
 others entitled to the estate. Ready money, too, becomes the

¹ 1 Wms. Exrs. 562 et seq.

² *Whale v. Booth*, 4 T. R. 625, n. Lord *Mansfield*, Ch. J., here said,
 "The general rule both of law and equity is clear, that an executor may dis-
 pose of the assets of the testator ; that over them he has absolute power, and
 that they cannot be followed by the testator's creditors. It would be mon-
 strous if it were otherwise ; for then no one would deal with an executor.
 He must sell in order to effect the will ; but who would buy, if liable to be
 called to an account ? It is also clear, that if at the time of alienation, the
 purchaser knows they are assets, this is no evidence of fraud ; for all the tes-
 tator's debts may have been already satisfied ; or if he knows that the debts
 are not all satisfied, must he look to the application of the money ? No one
 would buy on such terms. There is one exception, indeed, where a contriv-
 ance appears between the purchaser and executor to make a devastavit." s. c. 4 Doug. 36.

money of the personal representative of the estate, at once, since it has no such mark of identity as will * enable courts * 131 to treat it as the specific property of the estate. And where the executor pays money for the estate, he may take any portion of the estate in payment, and the part which he elects, not exceeding the amount paid by him, becomes absolutely his property.³ And where the personal representative pays debts of the deceased, in the order required by law, to the full value of the assets, they all thereby become his property.⁴ And it is said, in the English books, that if the executor have a valid debt of the testator, to the full value of the assets, they all thereby become his property, under his right of retainer.. But we apprehend that no such absolute right, to the exclusion of other creditors to share ratably in the assets, exists in favor of an executor or administrator, in most of the American states. It has been held, that an executor or administrator having claims against the estate which he represents may submit them to the commissioners appointed to adjust the claims against the estate, or he may charge them in his account as moneys paid towards the debts due from the estate. But whether allowed or not by the commissioners, the court before whom the final account is taken, may inquire into the validity of such claims.⁵ There are some other grounds, not likely to occur in practice very frequently, upon which it has been held, a personal representative of the estate may acquire title to the assets of the estate. Thus, if he underlease the remainder of a term for years, in his own name or as executor, it will be regarded as descriptio personæ merely, and the rent will be due personally, and must be recovered, in case of his decease, by his personal representative, and not in the name of the administrator de bonis non.⁶

³ *Woodward v. Lord Darcy*, Plowd. 184.

⁴ *Merchant v. Driver*, 1 Saund. 307; *Chalmer v. Bradley*, 1 Jac. & W. 51, 64.

⁵ *Adams v. Adams*, 22 Vt. 50. And where the estate is not settled in the insolvent form there is no tribunal before which the personal representative can bring claims which he may himself have against the estate, for adjustment, except the probate court upon the settlement of his account, and if he omit to present them there and subsequently resign and another is appointed administrator with the will annexed he can maintain no suit, either in law or equity, against such administrator. *Prentice v. Dehon*, 10 Allen, 353; post, § 28, pl. 9.

⁶ 1 Wms. Exrs. 574. See also *Skeffington v. Whitehurst*, 3 Y. & Coll. 1; *Cowell v. Watts*, 6 East, 405; *Catherwood v. Chabaud*, 1 B. & C. 150.

3. But unless such change of title is shown in some mode, the assets of the estate in the hands of the personal representative * 132 cannot be treated as his property. In case of bankruptcy they will not ordinarily go to the assignees.⁷ So, too, the goods of the estate are not liable to execution upon the debts of the executor or administrator.⁸ So, also, upon the decease of the representative of the estate, the assets in his hands do not go to his representative, as assets belonging to his estate, but to the administrator de bonis non. But the assets may have been so long treated as the private estate of the executor, &c., as to become liable for his debts, either upon execution or as assets in the hands of his personal representative.⁹ And it is said that after the lapse of six years or more, equity will so far regard the assets of the estate, as converted, that it will not interfere by injunction to restrain a creditor of the executor, &c., from levying upon them.¹⁰ But any short term would be wholly inadequate to raise any such presumption.¹¹

4. There is considerable discussion in the books in regard to the merger of a term where the executor is entitled to the remainder or reversion. But it seems to be settled, that this will not be allowed, whenever it will work injustice to the estate, or those interested in it.¹²

5. The marriage of an executrix, the assets remaining in specie, will not transfer any interest to the husband, except in those states where by statute he becomes united with his wife in the trust, and then only as trustee.¹³

⁷ *Ludlow v. Browning*, 11 Mod. 138; *Ellis*, ex parte, 1 Atk. 101. There are some few cases where the assets of the estate have become so intermingled with those of the bankrupt as to be difficult of separation, and to have been clearly within the order and disposition of the bankrupt, and so properly belong to the assignees. In re *Thomas*, 1 Phill. C. C. 159; *Fox v. Fisher*, 3 B. & Ald. 135. And where an executor or trustee has certain funds put into his hands, and is directed by the will to carry on business therewith for the benefit of the estate, and becomes bankrupt, the general funds of the estate are not affected thereby. *Garland*, ex parte, 10 Vesey, 110.

⁸ *Farr v. Newman*, 4 T. R. 621.

⁹ *Quick v. Staines*, 1 Bos. & Pull. 293.

¹⁰ *Ray v. Ray*, Coop. C. C. 264.

¹¹ *Lord Tenterden*, Ch. J., in *Gaskell v. Marshall*, 1 Moo. & Rob. 132; s. c. 5 C. & P. 31.

¹² 1 Wms. Exrs. 566-569, and cases cited.

¹³ *Powell, J.*, in *Thompson v. Pinchell*, 11 Mod. 177.

6. An executor, who is also the residuary legatee, will be treated * as the owner of the assets, after due provision is * 133 made for securing the payment of the debts due from the estate.¹⁴ And in general it may be said, the courts incline to adopt such constructions, in regard to the extent and character of the title of the personal representative, as to make it best subserve the purpose of such title; *i.e.*, the settlement of the estate, by the payment of debts and the distribution of the property.¹⁵

6 *a.* For this purpose it is the duty of the personal representative, where there are debts or legacies to be paid in money, to convert so much of the effects of the estate applicable to that purpose, either real or personal, as may be requisite for the purpose, into money, in a manner the most expeditious, consistent with obtaining the best price which the property will fairly command in the market. And if he sell for less than the fair market price, with a view to favor the purchaser, or any other party, the sale will be regarded as fraudulent, and the executor or administrator will be held responsible for what might have been realized for the property, if the best price which could have been obtained had been sought,¹⁶ or by proper proceedings the sale may be vacated and the personal representative required to sell again.

6 *b.* To justify the sale of real estate, under a decree of the probate court, it must appear that the sale is necessary for the payment of debts, legacies, or expenses of administrations, or else that a sale of part is necessary for these purposes, and that the value of the remainder would be greatly impaired by division.¹⁷ The fact that an irregular order of sale of real estate has been executed will not weigh with the appellate court in regard to the decision upon the question of affirmance.¹⁷

6 *c.* It is not regular for the probate court to issue license to the administrator to sell so much of the real estate as he shall

¹⁴ *Clarke v. Tufts*, 5 Pick. 337.

¹⁵ *Hall v. Hall*, 27 Miss. 458. But after the payment of debts, legacies, and expenses of administration, the estate remaining in the hands of the executor belongs to the residuary legatee. *Cooper v. Cooper*, L. R. 7 Ho. Lds. 53. And the same rule prevails in intestate estates, *mutatis mutandis*.

¹⁶ *Oberlin College v. Fowler*, 10 Allen, 545. The personal representative has been held responsible when he accepted Confederate money in payment for estate sold by him. But he may show that he was not in fault. *Pitts v. Singleton*, 44 Ala. 363.

¹⁷ *Gross v. Howard*, 52 Me. 192; *Wiley v. Wiley*, 63 N. C. 182.

deem for the interest of the estate. He should be required to sell sufficient to pay the debts and expenses of administration.¹⁸ The probate court cannot investigate the validity of the title of real estate upon petition for an order of sale. All which properly comes in question upon such a petition is the fact that the

* 134 personal * estate is insufficient to pay debts and expenses of administration.¹⁹ But it has been held to be the duty of an administrator or executor, before making sale of real estate supposed to belong to the deceased, under an order of the probate court, to cause search to be made of the true state of the title, and of any liens upon the same; and he will be so far affected with presumptive notice of the same, that, if any such liens exist, it will be his duty to retain sufficient to satisfy them out of the avails of the sale; and he cannot defend against the holder of a duly registered lien, upon the ground that he charged himself with the full amount of the price of the land, and distributed the same under the decree of the probate court. (a) It has been held, that where legacies are charged on real estate, the lien will continue, notwithstanding a sale by order of the probate court. (b)

6 d. Irregularities in proceedings to effect the sale of real estate will often be held fatal, where they are of essential importance to secure a fair sale, and especially before the sale has been carried into effect by the payment of the price.²⁰ But after the purchaser has paid the price and that has gone for the purposes of the sale, any informality, not of vital consequence, will be held not to avoid the sale.²¹

7. As a general thing the personal representative has no control

¹⁸ *Morris v. Hogle*, 37 Ill. 150.

¹⁹ *Cooper v. Armstrong*, 3 Kansas St. 78.

(a) *Estate of Cramp*, 28 Legal Int. Rep. 76, by Orphan's Court of Philadelphia.

(b) *Cool v. Higgins*, 23 N. J. Eq. 308.

²⁰ *Succession of Curley*, 18 La. Ann. 728.

²¹ *Emery v. Vroman*, 19 Wis. 689. If the court have jurisdiction, and the order of sale and the deed are regular, other informalities or the omission of the administrator to record his proceedings will not affect the title of the purchaser. *McNitt v. Turner*, 16 Wall. 352; *Cornett v. Williams*, 20 id. 226. But when the time for suing upon debts had expired, and no actions had been brought against the administrator, all lien upon the real estate for the payment of debts was held to have expired, and a license to sell real estate granted thereafter to be wholly void. *Tarbell v. Parker*, 106 Mass. 347; *Aiken v. Morse*, 104 id. 277. See *Patterson v. Lemon*, 50 Ga. 231.

over the real estate of the deceased, except in those states where it is made assets for the payment of debts, and then only to the extent of the excess of the debts above the amount of personalty applicable to their payment.²² This is done in some of the states by recovering a judgment against the personal representative and exposing the real estate to sale upon the execution.²³ But the more common course in the American states is to obtain an order from the probate court for the sale of sufficient lands belonging to the estate to make up the deficiency in the personal estate for the payment of the debts. (c)

8. In Massachusetts it has been decided,²⁴ that the personal representative has no right to the possession, use, or rent of the real estate of the deceased, as against the heirs, even where there is a deficiency of personal assets to pay debts, but it must go to the heirs unless they consent to have it go to the executor, &c., and the only mode by which the personal representative can appropriate such real estate or the income arising from it, is by pursuing the mode pointed out in the statute and proceeding under an order of sale. And the same rule obtains in most of the American states. By the present statute of Massachusetts,²⁵ it is * pro- * 135 vided that if the executor or administrator shall occupy the real estate, he shall account for such use and occupation before the probate court, and where the parties interested cannot agree in the amount for which he shall be held liable, the court may appoint

²² *Drinkwater v. Drinkwater*, 4 Mass. 354.

²³ *Rowland v. Harbaugh*, 5 Watts, 365; *M'Pherson v. Cunliff*, 11 S. & R. 422; *Wilson v. Watson*, Pet. C. C. 269.

(c) But after the lapse of seven years from the grant of administration, or of the term of the statute of limitations, no order for the sale of real estate should be granted, unless some excuse for the delay is shown, as necessary litigation, or something else. *Moore v. Ellsworth*, 51 Ill. 308. And no order for the sale of real estate should be granted where the debt is barred by the statute of limitations. *Ferguson v. Scott*, 49 Miss. 500. Estates in reversion or remainder may be sold for the payment of debts. *Williams v. Ratcliff*, 42 Miss. 145. The order of sale should show all the facts requisite to make the sale legal. *Howe v. McGivern*, 25 Wisc. 525; *Bray v. Neill*, 21 N. J. Eq. 343.

²⁴ *Stearns v. Stearns*, 1 Pick. 157; *Towle v. Swasey*, 106 Mass. 100; *Kimball v. Sumner*, 62 Me. 305. See also *Gibson v. Farley*, 16 Mass. 280. In New York the administrator, in his representative capacity, has nothing to do with the real estate of the intestate. *Hillman v. Stephens*, 16 N. Y. 278; *Breevort v. M'Jimsey*, 1 Edw. Ch. 551; *Griffith v. Beecher*, 10 Barb. 432.

²⁵ Gen. Stat. ch. 98, § 8.

a commission to determine the amount. But where such executor or administrator occupies such real estate in his own right, he is not bound to account for the same under such statute.²⁶

9. The executor, by virtue of power contained in the will, may dispose of the real estate of the testator for the payment of debts, the payment of legacies, or any other purpose specified in the power. But even in these cases the power is personal, and cannot be exercised by an administrator cum testamento annexo.²⁷

10. By the decisions in some of the states an administrator or executor may maintain an action to recover possession of real estate for the benefit of the heirs, until after a decree of distribution, and will recover according to the rights of those whom he represents.²⁸ But this practice is regarded as altogether exceptional, depending upon the peculiar structure and construction of the statutes.

11. The mere possession, in fact, of personal estate by the deceased, at the time of his death, without any property whatever therein, either general or special, is not sufficient to give the personal representative a good right of action to recover the same against a stranger, notwithstanding such bare possession would have enabled the testator or intestate himself, while living, to maintain such action.²⁹ But where there is any special property even, in the deceased, it will transfer the right of possession to the personal representative, unless that special property, by the death, vested in another.³⁰ And in short, the personal representative may always recover possession of all effects in the hands of the deceased at the time of his death, unless the defendant is

* 136 able to * show a better title in some other party to whom he will be liable to be called to account for the same.³¹ It

²⁶ *Almy v. Crapo*, 100 Mass. 218.

²⁷ *Conklin v. Egerton*, 21 Wendell, 430; s. c. 25 Wendell, 224. The title in such cases vests from the decease of the testator, and consequently a sale made by the executor before probate of the will is valid, if the will be subsequently proved. *Wilson v. Wilson*, 54 Mo. 213. But where the personal representative is allowed to convert personalty into realty, or vice versa, or to take the use of the realty, he will hold it in trust for the party entitled. *Terry v. Ferguson*, 8 Porter, 500; *Harper v. Archer*, 28 Miss. 212.

²⁸ *McFarland, Admr. v. Stone*, 17 Vt. 165; *Aldis, Exr. v. Burdick*, 8 Vt. 21; *Bergin v. McFarland*, 6 Foster, 533.

²⁹ 1 Wms. Exrs. 578.

³⁰ *Fyson v. Chambers*, 9 M. & W. 460.

³¹ *Elliott v. Kemp*, 7 M. & W. 306; *Reeves v. Matthews*, 17 Ga. 449. And

is scarcely needful to state that the officer making the sale cannot become the purchaser except at the election of the cestui que trust.⁸²

SECTION II a.

THE DISPOSITION OF PARTNERSHIP EFFECTS BY THE PERSONAL REPRESENTATIVE OF A DECEASED PARTNER.

1. The effects belong first to the surviving partner, until all debts are paid ; and the right of possession and of disposition of personalty, and of the use and disposition of realty, vest and continue in the surviving partners.
2. After this, but not before, the widow and heirs of the deceased partner may exercise the same rights as in regard to other lands of the deceased.
3. The English rule that partnership lands are personalty to all intents does not obtain here.
4. It is the duty of the personal representative to inventory the share of a deceased partner.

§ 17 a. 1. THE effects of a partnership, dissolved by the decease of one of the partners, belong, in the first instance and until all the debts are paid, to the surviving partners. The title of the personalty vests in the surviving partners, and they alone have the power to dispose of the same. It may be technically true that this title extends only to the right of possession and disposition for the purpose of settling up the concerns of the partnership, and does not amount to the absolute ownership, for all purposes ; but, practically, it is much the same as absolute ownership until the debts of the partnership are paid.¹ So, too, the real estate of the partnership, so far as the title vests in the heirs of the deceased partner, whether in whole or as tenants in common with the survivors, is held by them in trust for the use of the survivors until all partnership debts are paid, until which the widow of a deceased partner can have no dower²

even personal property, exempted by statute from attachment or levy of execution, will vest in the personal representative, the exception being personal to the decedent. *Johnson v. Cross*, 66 N. C. 167. But such property will generally, it is presumed, be applied for the benefit of the widow and family, in preference to creditors. See also *Fulcher v. Howell*, 11 Simons, 100.

⁸² *Anderson v. Green*, 46 Ga. 361; post, § 63.

¹ *Parsons on Partnership*, 444 et seq.; *Ex parte Williams*, 11 Ves. 5.

² *Burnside v. Merrick*, 4 Met. 537; *Dyer v. Clark*, 5 Met. 562; *Howard v. Priest*, 5 Met. 582.

in partnership lands, and the rents and profits must go to the surviving partners.

2. But after the settlement of all partnership debts and claims of every kind, the heirs and widow of the deceased partner will have precisely the same rights in partnership lands remaining undisposed of as if they had never belonged to such partnership,³ or were held by the partners as tenants in common.

3. It has sometimes been supposed that the rule of the English law, by which it is held that real estate owned by a partnership is so effectually converted into personalty by its being applied to that use, that whatever may remain after the settlement of all the partnership concerns must be regarded and treated, for all purposes and to all intents, as personalty, equally obtains in this country. But there is no reason here to maintain any such doctrine, and the decisions show that it has not been done.⁴

4. It is the duty of the personal representative of a deceased partner to embrace in his inventory of the estate the share in such partnership. The personal representative may settle with the surviving partner and accept a portion of the partnership effects, if he so elect.⁵

SECTION III.

THE POWER OF THE EXECUTOR TO SELL REAL ESTATE, AND THE DISPOSITION OF THE AVAILS. EQUITABLE CONVERSION.

1. The power to dispose of the estate under the will often given the executor.
2. Not important to the execution of the power whether the title passes, or not.
 - n. 1. The authority and the distinctions, as to the title of the executor, discussed.
3. The American cases considered.
4. How far powers of sale under a will may be conferred by implication.
5. The equitable conversion of land into money, and money into land, considered.
6. The subject, although by no means wholly unimportant, is less operative here than in England.
7. A conversion out and out sometimes intended.
8. In America, an out and out conversion is commonly intended, if any.
9. The courts do not favor any other.
10. Directions for conversion extend to after acquired estate.

³ Parsons on Partnership, 372 et seq. See also n. 2.

⁴ Parsons on Part. 369 et seq. See also n. 2.

⁵ *Moses v. Moses*, 50 Ga. 9.

11. Where the executrix receives satisfaction of a debt due the estate, in land, she makes herself debtor to the estate.
12. How a power of appointment may be extinguished.
13. Conversion complete from date of order of sale.
14. Defective power supplied by acquiescence.

§ 18. 1. It not unfrequently happens, that the executor derives an express authority from the will itself, to deal with the real estate of the testator in a particular mode, in order to carry into effect the purposes of the will. This authority is denominated a power under the will, and embraces a topic which, in various forms, occupies a large space in the settlement of estates, and which we hope some time to discuss more at length under the more general head of Testamentary Powers, their construction and operation, than it will be in our power to do here. We must here content ourselves with a very brief allusion to the topic.

2. It is often made a question whether the executor takes a fee-simple under the will, upon which his power to dispose of the same is ingrafted, or a mere naked power to dispose of the title to the estate, in a particular mode, in order to effect the purposes of * the will.¹ But the distinction is not important in a * 137 practical sense, since the effect is much the same in either case. In all cases where such a power exists, it should receive a liberal construction, in order to effect the true purposes and intents of the will. In a late case² where the will gave the executrix power to mortgage the real estate in aid of the personal, and after entering upon the duties of her office, she had opened an account

¹ The distinction here alluded to is a good deal discussed in the books, as a speculative inquiry, and is made to turn upon the particular phraseology of the will. It is said the devise of the land to the executors to sell, passes the title; but a devise that the executors may sell, or shall sell lands, or that they may or shall be sold by the executor, gives them only a naked power of sale. Sugd. Powers, 8th ed. 112; Doe v. Shotter, 8 Ad. & Ellis, 905. And the learned author of the work on Powers, just cited, seems to infer, from all the cases, that the title does not pass to the executor, unless there are express words to that effect. Powers, 114; Dundas' Appeal, 64 Penn. St. 325; Vernon v. Vernon, 53 N. Y. 351.

² Farhall v. Farhall, L. R. 7 Eq. 286; s. c. 17 W. R. 350. But this decision was qualified in the court of chancery appeal, when the bank applied for leave to prove the balance of their debt above the security against the estate, and it was held the executor had no power to create a debt against the estate in this mode, even if he had power to pledge certain assets to secure advances. Farhall v. Farhall, L. R. 7 Ch. App. 123.

with the bankers of the testator, and having largely overdrawn her account and being required by the bank to find security, she mortgaged the real estate of the testator for that purpose and for future advances, and expended most of the money on her own personal expenses and that of her family, the mortgage was held valid, and it was declared that the bank were not bound to see to the application of the money.

3. The American cases upon this general question are very numerous, and not always reducible to any general and recognized course of construction. We find many of them collected by Mr. Fish, in his note to Williams.³ In some cases the American courts have adopted a very liberal construction in extending the powers of an executor to every necessary agency in settling the estate.⁴ But in other states the construction has been more straitened, as we have before intimated.⁵ In Pennsylvania, while it is held that an administrator de bonis non, cum testamento annexo, cannot execute any trust reposed in the executor as a trustee under the will,⁶ it has nevertheless been considered that he has the same power to sell lands as the executor for whom he is substituted,⁶ but, in New York, this latter proposition is * 138 questioned.⁷ * And where the administrator cum testamento annexo, has assumed to act as trustee in regard to the real estate, he will be liable to account in that capacity, upon a familiar principle of the law of trusts.⁸ It has been held that where the executor having power to sell and convey real estate, under the will, does so with covenants of warranty, that is regarded as so far the act of the estate, that all devisees under the will are estopped from setting up any outstanding title against the grantees of the executor.⁹ And it is here held, that where such a power is given to joint executors, and any neglect to qualify, this will be regarded as *prima facie* evidence of a refusal to act and the others may perform the duty.

4. Where a power of sale and disposition of real estate is given,

³ 1 Wms. Exrs. 519.

⁴ *Sorrell v. Ham*, 9 Ga. 55. See *Lippincott v. Lippincott*, 4 C. E. Green, 121; *Booream v. Wells*, id. 87; *Rankin v. Rankin*, 36 Ill. 293.

⁵ *Ross v. Barclay*, 18 Penn. St. 179.

⁶ *Commonwealth v. Forney*, 3 W. & S. 353, 356.

⁷ *Gilchrist v. Rea*, 9 Paige, 66.

⁸ *Le Fort v. Delafield*, 3 Edw. Ch. 32.

⁹ *Robertson v. Gaines*, 2 Humph. 367.

in general terms, in the will, without naming by whom the same shall be executed, if the avails are distributable by the executor, or are provided to go in payment of debts or legacies, the power will be regarded as conferred upon the executor by implication.¹⁰ But there has been considerable discussion in the books as to the precise extent of the agency of the executor in the distribution of real estate, or the avails of it, which will be requisite to give them a power of sale by implication. The better opinion at present seems to be, that the mere fact that the avails of such real estate, after it is converted into money, are directed to go in such a direction that it will have to pass through the hands of the executor in the form of money, will, by implication, give a power of sale. Sir *John Leach*, in *Bentham v. Wiltshire*,¹¹ thus defines the basis of such an implication: "To enable the executors to sell, the power must either be expressly given to them, or necessarily to be implied,* from the produce being to pass through their * 139 hands in the execution of their office, as in payment of debts and legacies."¹²

¹⁰ *Curtis v. Fulbrook*, 8 Hare, 278. But see *Bell's Appeal*, 66 Penn. St. 498, contra. And if the produce of the real and personal estate are commingled in the same general fund, the power to sell will vest in the executor by implication. *Tylden v. Hyde*, 2 S. & Stu. 238; *Forbes v. Peacock*, 11 Sim. 152; *Robinson v. Lowater*, 17 Beav. 592; s. c. 5 DeG., M. & G. 272. Where the will contains any direction in regard to the disposition of the real estate, or indeed any other provision which cannot reasonably be carried into effect, without the sale of the real estate, a power to do that is implied. *Gosling v. Carter*, 1 Coll. C. C. 644; *Bentham v. Wiltshire*, 4 Mad. 44.

¹¹ 4 Mad. 44.

¹² See also *Forbes v. Peacock*, 11 Sim. 152, where the Vice-Chancellor, *Shadwell*, cites the manuscript case of *Ward v. Devon*, and adopts a very similar rule. In *Lippincott's Exec. v. Lippincott*, 4 C. E. Green, 121, the Chancellor says, "The appointment of one as executor," where the will "directs lands to be sold does not of itself confer a power of sale." Citing *Patton v. Randall*, 1 Jac. & W. 189. "But if the executor is directed by the will or bound by law, to see to the application of the proceeds of the sale, or if such proceeds are [by the will] mixed up and blended with the personalty, — which it is the duty of the executor to dispose of and pay over, — then a power of sale is conferred on the executor by implication." See also *Hunnier v. Rogers*, 55 Barb. 85. In *Patton v. Randall*, 1 Jac. & W. 189, the Master of the Rolls seems to hold that where real estate is devised generally and a subsequent contingency named for a sale, the power of sale must by implication reside in the devisees, and not in the executors. In *Seeger v. Seeger*, 21 N. J. Eq. 90, it was held that a power to sell real estate will not be inferred from the fact that it will become necessary, in order to enable the executor to carry out the

5. The doctrine of equitable conversion, by which money directed to be invested in land is treated as land, that being regarded as done in a court of equity which is agreed to be done, or directed to be done; and the converse of this rule, by which the avails of land directed to be converted into money are still, for many purposes, treated as land; and the rights of parties claiming the same are regarded in the same light as if it were still land; both these rules have long been familiar to those conversant with the law and the practice of courts of equity.¹³

6. This rule of equitable conversion, although it may often become important in the settlement of estates in the American states, is not so, to the same extent that it is in England, since here the whole estate, both real and personal, is by law charged with the payment of debts; and in the main, the statutes of distributions and of descents give the real and personal estate to the same persons. And still the instances are more numerous than
 * 140 at first * sight might occur to all, where this doctrine of equitable conversion of land into money, and vice versa, will become important.¹⁴ We may recur to the subject again.

7. The law allows the testator to direct an absolute conversion of real estate into money for all purposes, or what is called a "conversion out and out." To this end it is requisite, not only that the will contain a direction to change land into money, but that it should appear that it was the purpose of the testator that it should, after its conversion,¹⁴ be treated as money for all purposes. In all

provisions of the will. But this seems questionable where the necessity for the sale is apparent from the will. But the fact that the lands are expressly charged in the will with the payment of debts raises no implied power of sale by the executor. In *re Fox*, 52 N. Y. 530.

¹³ *Fletcher v. Ashburner*, 1 Br. C. C. 497. The rule is here stated by Sir *Thomas Sewell*, M. R., thus, "That nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property, into which they are directed to be converted; and this, in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." Lord *Alvanley* approves this definition in *Wheldale v. Partridge*, 5 Vesey, 388, 396.

¹⁴ *Johnson v. Woods*, 2 Beavan, 409, 413. See also *Hopkinson v. Ellis*, 10 Beavan, 169, 175; *Shallcross v. Wright*, 12 id. 505, 508.

such cases the avails of the land go, to all intents, in the same direction as if it had never been land.

8. It may not be possible to lay down any universal rule which will operate wisely in all cases in regard to this subject in this country. But it is believed that the rule itself, of treating land as money, or money as land, has been so little practised upon, and is so little understood by the great mass of the people, or even by the profession in this country, that it would be safer to treat all directions in devises or contracts to convert land into money, or the contrary, as intending an "out and out" conversion, for all purposes, unless the contrary appeared from the instrument itself. There are, doubtless, some cases where the conversion is by operation of law, and where such a contingency arises as might thereby produce a different distribution of the avails from that of the original fund, where it may be wise to adopt the English rule, to avoid injustice. But the rule is so arbitrary and so artificial, that it will be likely to produce more injustice in this country than it will cure, unless restrained within very narrow limits, and kept under wise control. Such appears to be the tendency of the decisions in some of the states already.¹⁵

9. There are numerous American cases, of reputable authority, wherein the courts have manifested a disinclination to look into the source from which money is derived in ascertaining the proper disposition to be made of it. Thus where a will directed a sale of the testator's lands and that the proceeds of such sale and of all * his other property should be distributed among his * 141 children, it was held to constitute a conversion, "out and out."¹⁶ And the same view was taken in regard to money paid into court by a railway company, in compensation for land taken under the statute, belonging to an imbecile person and who con-

¹⁵ *Dyer v. Cornell*, 4 Penn. St. 359; *Grider v. M'Clay*, 11 S. & R. 224; *Pennell's Appeal*, 20 Penn. St. 515. The subject is discussed in *Place in re*, 1 Redf. Sur. Rep. 276; *Nagle's Appeal*, 13 Penn. St. 262, per *Bell, J.* In *Cook's Exrs. v. Cook's Admrs.*, 5 C. E. Green, 375, the question is considerably discussed, and the result reached, that where the directions in the will require a sale of land, it is equivalent to a positive direction to sell, and the land is deemed personal property from the death of the testator; but where it is optional with the executor to sell or not, or if it is only an authority to sell, without any direction, then the land retains its character until actual sale.

¹⁶ *Smith v. McCrary*, 3 Ired. Eq. 204.

tinued such to the end of his life, although not under guardianship, and the same was ordered to be paid to the executors.¹⁷ And the same inclination is manifested in another case,¹⁸ where the doctrine of conversion is pronounced extremely artificial, and not to be applied in chancery, unless there is a clear manifestation of the testator's intention to that effect.

10. Where the testator directed that all his estate should, by his executor, be collected and converted into money, and held for the payment of his debts, and the residue to be disposed of under certain trusts; it was held that the executor had power to sell real estate subsequently acquired by the testator.¹⁹ But a direction in the will that the executor shall sell certain land for the support of the widow, if necessary for that purpose, will create no legal demand on the estate for supplies furnished the widow by a stranger.²⁰

11. Where the executrix receives a conveyance of land to herself in payment or satisfaction of a debt due the estate, the title vests in her personally, whether she is described as executrix or not, and if she ultimately dispose of the land, or its proceeds, in apportioning the estate among the heirs and distributees, it must be regarded as sufficiently accounting for the debt.²¹

12. The donee of a power to appoint a fund among strangers to the donee, after the expiration of the donee's life interest under the instrument of donation, cannot release the power, for a consideration of benefit to himself, without the consent of the appointees. But an arrangement made among all the parties interested, except the appointees, and sanctioned by an act of the legislature, whereby the power was extinguished, was confirmed in the Court of Chancery, although some of the appointees under the power were still infants.²² This was, no doubt, done upon the grounds that the donee of the power could not be compelled to exercise it, and if he did not, the remainder of the fund, after the termination of the life estate, would go to the next of kin of the donor, among whom and the donee of life estate the arrangement was made for the distribution of the whole fund among themselves.

¹⁷ *Flamank, ex parte*, 1 Sim. N. S. 260.

¹⁸ *Samuel v. Samuel*, 4 B. Mon. 245, 253.

¹⁹ *Hamilton v. Buckmaster*, Law Rep. 3 Eq. 323.

²⁰ *Hunt v. Holden*, 2 Mass. 168.

²¹ *Greer v. Walker*, 42 Ill. 401.

²² *Thomson's Exrs. v. Norris*, 5 C. E. Green, 489.

13. The conversion is regarded as complete from the time of the order of sale, where it is effected through the agency of courts of justice; and the subsequent decease of one of the parties will not be regarded as any impediment.²³

14. Where trust property is sold under a defective power, and the price paid by the purchaser to the trustee for sale, and by him applied to the purposes to be subserved by the sale, courts, after a considerable lapse of time, manifest a disinclination to interfere with the title, considering it as effectually quieted by the lapse of time and the general acquiescence of those interested adversely to the sale.²⁴

* SECTION IV.

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THE RIGHT OF THE EXECUTOR TO CHATTELS REAL.

1. Chattels real go to the executor and not to the heir.
2. This includes terms for years. Estates of freehold go to the heir.
3. The executor must accept a term of years belonging to the testator, without regard to its value.
4. Estates pur autre vie, how disposed of in case of the death of the grantee.
5. The effect of the provision of the statute of frauds in this respect.
6. The residue of an estate pur autre vie after death of grantee not devisable.
7. All mortgage interests due the estate are regarded as mere personalty.
8. Welsh mortgages, or those foreclosed, treated in same way, unless some indication to contrary.
9. But where a foreclosure is opened, after the decease of the mortgagee, the money goes to the heir.
10. The union of the estate of mortgagor and mortgagee operates to extinguish the mortgage, unless contrary to the intent of mortgagee.
11. The sale of the mortgaged estate makes any surplus accruing therefrom personalty, unless the sale occurs after the death of mortgagor.
12. The wife's interest in her chattels real survive to her, unless divested during coverture.
13. Some act reducing it to the possession of the husband, required during his lifetime.
14. What acts on the part of the husband will or will not defeat wife's right.
15. Where the husband survives, he takes his wife's chattels real as survivor.
16. The personal representative may become seised, by way of condition.
17. Or in remainder, sometimes.
18. Where this latter estate occurs, such construction adopted as to uphold the estate.

²³ *Arnold v. Dixon*, L. R. 19 Eq. 113; *Steed v. Preece*, 18 id. 192.

²⁴ *Hazard v. Martin*, 2 Vt. 77; *Doolittle v. Holton*, 26 Vt. 588; s. c. 28 id. 819; *Favill v. Roberts*, 50 N. Y. 223.

§ 19. 1. It is scarcely necessary to state that all such interests arising out of land as are denominated chattels real go to the executor and administrator, and not to the heir.¹ This embraces many species of estates in England not known here, such as advowsons, or the right of presentation to church livings.

2. But, in this country, this class of property includes all estates for years, however long the period of its duration. But all estates for life, or for an uncertain period, which may endure for life, — as during widowhood, or so long as one shall remain unmarried, or during coverture, or as long as the grantee shall dwell in a particular place, — are regarded as estates of freehold, and go to the heir.²

* 143. * 3. And it seems that where the testator holds a term for years it will vest in the executor, and he is obliged to accept of the same, whether it is of any value or not.³ But that peculiar species of estate denominated a term attendant upon the inheritance, is regarded in equity as confined to the freehold, and inseparable from it.⁴

4. In case of an estate, during the life of another person, *pur autre vie*, as it is called, if the grantee died during the life for which the estate was granted, there remained an unexpired portion of the estate during the period that the life estate survived, which, at common law, went to the first occupant without accountability, unless the grant was made in the first instance to the grantee and his heirs, or to him and his executors, &c. In that event, the heir or executor, as the case might be, took, as special occupant, but without accountability to any one.⁵

5. But by the statute of frauds,⁶ this peculiar state of circum-

¹ 1 Wms. Exrs. 592.

² Co. Litt. 42 a; 2 Black. Comm. 386. But where the intestate owned a public house in fee, in which he had carried on business, and the same was sold on a lease, it was held, as between the heir-at-law and the next of kin, that any portion of the amount realized, representing good-will, could not be separated from the interest of the heir-at-law. *Booth v. Curtis*, 20 Law T. N. s. 152.

³ *Billinghurst v. Speerman*, 1 Salk. 297.

* 1 Wms. Exrs. 602.

⁵ 1 Wms. Exrs. 602. There was no estate by courtesy issuing out of such an estate. *Stead v. Platt*, 18 Beavan, 50.

⁶ 29 Car. 2, ch. 3, § 12. Some questions have arisen under this clause of the statute in regard to the particular person entitled to hold the residue of an estate *pur autre vie* after the death of the grantee, but in the American states it is believed such residue will generally be treated as assets, in the first in-

stances was relieved, and the heir or executor was declared to hold in trust for the creditors and others interested in the assets of the estate; and if the heir or executor were not named in the grant, then the remainder of the estate, after the death of the grantee, became assets in the hands of the personal representative. And this provision of the statute of frauds has unquestionably been * generally adopted in the American states as part of * 144 the common law, where it has not been specially re-enacted.

6. It was also held, anterior to the provision in the statute of frauds just referred to, that such residue of an estate *pur autre vie* was not devisable, but by that statute it is made so. This provision of the statute is unquestionably adopted in this country as a general thing, either upon the basis of its innate justice and propriety, or as incorporated into the common law at the time of the separation of this country from England.

7. The interest of the mortgagee will always go to his personal representative, whether it be for a term of years or in fee, it being regarded in all cases as mere personalty, and strictly a chattel interest.⁷ The same rule obtains universally in the American states.⁸ And it will make no difference that the estate was in the course of foreclosure at the time of the decease of the testator.⁹ And where the administrator takes a mortgage upon real estate to secure the payment of a debt due the intestate, and after foreclosure sells the estate, and wastes the money received in payment for the same, the mortgagee acquires no such equitable title on behalf of the estate as will justify any interference with the title of the purchaser, who will hold the same exempt from all equity or liability, to see to the application of the purchase-money.¹⁰ In other words, no trust

stance, in the hands of the personal representative, unless otherwise specially disposed of. But see *Atkinson v. Baker*, 4 T. R. 229; *Carpenter v. Duns-mure*, 3 E. & B. 918; *Doe v. Steele*, 4 Q. B. 663; *Bearpark v. Hutchinson*, 7 Bing. 178. In New York, 1 Rev. Stat. 722, on the death of tenant *pur autre vie*, the estate becomes a chattel real, and goes to the personal representative. *Reynolds v. Collin*, 3 Hill, 441. See *Payne v. Harris*, 3 Strobb. Eq. 39; *Ackland v. Pring*, 2 Man. & Gr. 937.

⁷ *Tabor v. Tabor*, 3 Swanst. 636, and numerous earlier cases cited, 1 Wms. Exrs. 608, n.

⁸ *Smith v. Dyer*, 16 Mass. 18.

⁹ *Fay v. Cheney*, 14 Pick. 399. The heir of the mortgagee has no such title as to enable his grantee by quitclaim deed to maintain an action even against the heir being in possession. *Taft v. Stevens*, 3 Gray, 504.

¹⁰ *Long v. O'Fallon*, 19 How. U. S. 116.

attaches on behalf of the estate under such circumstances, as to lands so situated in the hands of the administrator, which can be followed into the hands of a bonâ fide purchaser.

8. And the same rule will apply to a Welsh mortgage, where the estate is to be held by the mortgagee until the debt is paid by the rents and profits.¹¹ And even where the land becomes irredeemable, in the case of an ordinary mortgage, by adverse possession, release of the equity of redemption, or foreclosure, the heir will hold the same in trust for the personal representative.¹²

* 145 But * where the mortgagee devises the land in such a form as to indicate his purpose to have it treated as real estate, or where he indicates such purpose in any other mode, it will be so regarded and treated.¹³

9. But it has been held, that if the mortgagee in his lifetime, by any process, foreclose the equity of redemption, and enter into possession, and after his death the decree be opened, or a release of the equity set aside, the heir and not the executor will be entitled to the money.¹⁴ The executor of the mortgagee is the proper party to enforce the mortgage.¹⁵

10. Where the mortgaged estate comes to the mortgagee either by devise or descent, it may become a question how far the charge is thereby merged. The general rule in courts of equity seems to be, that the union of the two estates of mortgagor and mortgagee will effect an extinguishment of the mortgage estate, by merger, unless it be for the interest of the mortgagee still to keep it on foot, in which case it will be treated, in equity, as still subsisting,

¹¹ Lord Chancellor *Hardwicke*, in *Longuet v. Scawen*, 1 Ves. Sen. 402, 406.

¹² *Clerkson v. Bowyer*, 2 Vernon, 66. But it is here said, if the heir in such case will pay the mortgage-money to the executor, he may hold the estate. See also 1 Wms. Exrs. 608, and cases cited. *Demarest v. Wynkoop*, 3 Johns. Ch. 129.

¹³ *Noys v. Mordaunt*, 2 Vernon, 581.

¹⁴ *Lawrence v. Beverly*, cited in *Lechmere v. Carlisle*, 3 P. Wms. 211, 217.

¹⁵ *Copper v. Wells*, Saxton's Ch. 10. The executor of the mortgagor, having no interest in the suit, cannot revive a suit brought by such mortgagor to redeem, and who died pending the same. *Douglass v. Sherman*, 2 Paige, 358. But where by the death, which abates the suit, the title passes to others besides the personal representatives, and it becomes a disputed question to whom the title has passed, the suit for redemption cannot be revived except by a supplemental bill, in the nature of an original bill setting forth all the facts. *Ib.*

although extinguished in strictness of law.¹⁶ The same rules of construction, in regard to the extinguishment of the mortgage by the union of the estates of the mortgagor and mortgagee, obtains, for the most part, in the American states.¹⁷ But these questions * seldom, if ever, arise in this country, as between * 146 the heir and the executor.

11. Where a mortgage deed contains a power of sale, and by means of the sale of the whole estate a surplus of money is produced, above what is required to pay the mortgage, if this be done during the life of the mortgagor it will thereby become personal estate to all intents. But if the sale take place after the death of the mortgagor, it will still be regarded as real estate, since an equity of redemption is always so regarded, and, as such, primarily goes to the heir.¹⁸ The same rule obtains in the American states.¹⁹

12. Questions sometimes arise between the wife and the personal representative of the husband, where she survives, whether her chattels real shall go to the one or the other. This depends in every case, upon the prior inquiry, whether the husband, during his lifetime, had done any act to dispossess his wife of her interest; for unless this be done, the chattel interest in the realty will survive to her.²⁰

13. It is certain that the mere devise by the husband of the wife's chattels real will not divest the interest of the wife, if she survive him, as no estate vests under the will until the death of the husband, and the wife's right of survivorship will be regarded as first taking effect.²¹ But if the husband and wife be ejected of a term which he held in her right, and the husband bring ejectment for it, in his own name, which he may do,²² and recover, that

¹⁶ *Price v. Gibson*, 2 Eden, 115; *Donisthorpe v. Porter*, id. 162; s. c. *Amblar*, 600; *Compton v. Oxenden*, 2 Ves. Jr. 261; *Gricè v. Shaw*, 10 Hare, 76. Where the owner has two charges, and a third person has also a charge, interposed between the others, it is not presumable that he will desire to have his charges merged, thus bringing the intervening one to the first place. Lord *Cranworth*, Chancellor, in *Johnson v. Webster*, 4 DeG., M. & G. 474, 488.

¹⁷ *Marshall v. Wood*, 5 Vt. 250; *Brien v. Smith*, 9 W. & S. 78; *Moore v. Harrisburg Bank*, 8 Watts, 138.

¹⁸ *Wright v. Rose*, 2 Sim. & Stu. 323; *Bourne v. Bourne*, 2 Hare, 35.

¹⁹ *Bogert v. Furman*, 10 Paige, 496; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Cox v. McBurney*, 2 Sandf. Sup. Ct. 561.

²⁰ 1 Wms. Exrs. 612, and n.

²¹ *Ibid.*

²² *Brett v. Cumberland*, Bulst. pt. 3, 163.

will divest her interest it is said. Or if, upon a dispute between the husband and another person, in regard to a term of years, claimed by the husband in right of his wife, it be referred to an arbitrator who awards the same to the husband, that will defeat the wife's right to survivorship.²³

14. As the husband may divest the right of the wife, in * 147 her * chattels real, by any absolute disposition of the same, so if he make a partial disposition of them, as by assigning or underleasing a portion of the term, this will operate to divest her interest pro tanto, and the reserved rent upon such partial assignment will go to the executor of the husband.²⁴ So too if the husband mortgage the term and then pay the money, taking an assignment to himself, it will defeat the wife's survivorship.²⁵ But if the husband pay the money due upon the mortgage, taking no assignment, it will be regarded as restoring the estate to the same condition it was in before the mortgage.²⁶ And a note and mortgage, made to husband and wife, will go to the wife if she survive.²⁷

15. But if the husband survive the wife he will take her chattels real, by survivorship, and is not required to have taken letters of administration during his life, in order to have them pass to his next of kin.²⁸ But this rule will not extend to the chattels real of the wife of which she and the husband were not in possession during the life of the wife, she having been dispossessed of the same, and the husband never having recovered them, either for himself or for himself and wife jointly.²⁹ But in most cases where the personal representative of the wife has obtained possession of her chattels real, where the husband survived her, he has been held liable to account as a trustee³⁰ to the representative of

²³ 1 Wms. Exrs. 613, and n. But see *Hunter v. Rice*, 15 East, 100, where it is said that the title does not pass by the award. But the better opinion is that it does pass by the award, and so are the more recent cases. *Akely v. Akely*, 16 Vt. 450, and numerous cases there cited.

²⁴ Lord *Eldon*, in *Druce v. Denison*, 6 Vesey, 385, 394. But the residue of the term will be regarded as undisposed of, and as such survive to the wife. *Sym's Case*, Cro. Eliz. 33; 1 Wms. Exrs. 615.

²⁵ 1 Wms. Exrs. 614.

²⁶ *Yong v. Radford*, Hob. 3.

²⁷ *Draper v. Jackson*, 16 Mass. 480; *Burleigh v. Coffin*, 2 Fost. 118; *Hawkins v. Craig*, 6 Mon. 254.

²⁸ 1 Wms. Exrs. 616, and notes.

²⁹ *Ibid.*

³⁰ *Humphrey v. Bullen*, 1 Atk. 458; *Elliot v. Collier*, 3 Atk. 526; s. c. 1 Ves. Sen. 15. In the latter case the personal representative of the husband was held entitled, in preference to the representative of the wife.

the husband, or to the husband himself, if alive. But where a distributive share of personal estate accrues to the wife, during coverture, and the husband dies before decree of distribution, and without any act on his part to reduce it to possession, it survives to the wife.³¹

16. So chattels real may accrue to the personal representative, * by reason of the non-performance of a condition, * 148 upon the part of the grantee of the decedent, whereby it was agreed the grant should become void. And the grantor having deceased, his personal representative becomes seised of the estate by reason of the non-performance of the condition. Or the grant may have been made by way of mortgage, upon condition to become absolute upon failure to pay the money by a day named, and, the mortgagor having deceased, it becomes the duty of the executor to pay the money, being less than the value of the estate, in order to revest the same.³²

17. So where the testator is entitled in remainder to chattels real, but the intermediate estate does not terminate during his life, his executor will be entitled in remainder.³³

18. It seems to have been early settled, that where the right of the decedent depended upon a contingency, and this did not occur during his life, that the estate should vest in his personal representative whenever the contingency did occur. But there is considerable conflict in the early cases and among the text-writers, as to the precise form in which such an estate becomes effective. The more natural and intelligible form is to give the estate in remainder to the party, his executors, and administrators, and then the whole estate will vest immediately, and no question can arise in regard to the intermediate estate continuing until the remainder vests. But where the remainder is limited, in terms, to the executor or administrator, after the decease of the testator or intestate, and the remainder is made dependent upon an intermediate estate which lasts beyond the life of him first entitled in remainder, a technical difficulty may arise, unless the words "executor," &c., are construed as words of limitation, and not of purchase, which is at the present day the more general construction, in all cases where the language will admit such construction.³⁴

³¹ *Hayward v. Hayward*, 20 Pick. 517.

³² 1 Wms. Exrs. 617.

³³ *Ibid.* 618.

³⁴ See *Spark v. Spark*, Cro. Eliz. 666 ; s. c. *Owen*, 125 ; Same name, Cro.

* SECTION V.

THE ESTATE OF THE EXECUTOR IN LIVE ANIMALS, AND THOSE
FERÆ NATURÆ.

1. The estate of an executor in live animals the same as in other personalty of the testator, with the exception of animals feræ naturæ.
2. The executor will take this qualified property of the testator in most cases.
- n. 2. The true state of such property defined in America.

§ 20. 1. THE estate of the executor (which we use here and elsewhere often in this treatise as a generic term for personal representative) in live animals belonging to the deceased, will not require any special definition, except as to those species of animals which have been partially reclaimed from a state of nature, and are held by a quasi imprisonment. These are deer in a park, rabbits in a warren, and fish in a pond, or, it is sometimes said, doves in a cote.¹

2. In regard to all animals feræ naturæ, it may be said, in general terms, that any special property which the testator has will generally pass to the executor. This species of property we need not discuss, since it will be found sufficiently defined in the elementary books upon the subject. But there is one important qualification in regard to the property of the personal representative in animals feræ naturæ, that where they are not held in gross, like fish in a vase, or deer or rabbits about the house, but are attached to particular portions of land as a permanent fixture, like deer in a park and fish in a pond or rabbits in a warren, they become, it has been said, a quasi attachment to the realty, and go to the heir. In such cases, the executor has no interest in the animals, unless they are attached to an estate for term of years belonging to the deceased, and which will, as we have seen, pass to the personal representative.²

Eliz. 840; Noy, 32; Yelv. 9. See also Cranmer's Case, Dyer, 309; Finch v. Finch, Moore, 339; 1 Wms. Exrs. 618-624.

¹ 1 Wms. Exrs. 625-628.

² Liford's Case, 11 Co. 46 b, 50 b, where the general subject of what appertains to the inheritance is discussed. See also Davies v. Powell, Willes, 46, where it was held that deer in an enclosed ground might be distrained for rent. And in Morgan v. Earl of Abergavenny, 8 C. B. 768, it was held, that

* SECTION VI.

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THE PROPERTY OF THE EXECUTOR IN GROWING FRUIT, TREES, AND
GRAIN OR GRASS.

1. Growing fruit, not severed at the decease of the owner of land, goes to the heir.
2. So of timber and trees, unless separated by contract of sale or reservation.
3. There is a distinction between trees fit for timber and such as are not.
4. Emblements, when the estate determines providentially, regarded as mere personalty.
 - (1.) Emblements embrace all annual crops which are the result of cultivation.
 - (1 a, and n. 10.) The American cases, and the opinion of Lord *Denman*, confirm the same views.
 - (2.) The executor may always claim emblements.
 - (3.) Executor cannot have emblements, where land is devised, or goes to dowress, or to joint tenant.
 - (4.) The husband's executor entitled to emblements on wife's land if crops sowed by husband.
 - (5), (6). The right to emblements gives the right of entry and of egress and regress, without payment of rent. Growing crops assets.

§ 21. 1. THE growing fruit upon land, until it is severed, is regarded as part of the realty, and goes with the land. So that if the owner deceases before the same is severed, it will pass to the heir,¹ unless where, by special statute, as in many of the American states, it is provided that the family of the deceased shall remain in the homestead, and have an allowance by way of maintenance out of the estate during the settlement of the same.²

deer in a park (although an ancient and legal park) may be so tame and reclaimed from their natural wild state, as to pass to executors as personal property. And we apprehend that there will be found few, if any, cases in America, where any species of animals, except fishes, who subsist in water, and thus become part of the soil, as it were, will be so far attached to the freehold as to pass with it. It was held in *New York (Brigham v. Bush, 33 Barb. 596)*, that under their revised statutes declaring, in case of the decease of a man having a family, that one cow shall go to the family, and not become assets in the hands of the personal representative, that this imports a milch cow, if there be any such belonging to the estate.

¹ *Rodwell v. Phillips, 9 M. & W. 501*, where it was held that an agreement for the sale of growing fruit is an agreement for the sale of an interest in land. See also 1 *Wms. Exrs. 628*.

² General Statutes of Vermont, § 1.

2. It is also, in general, true of timber and trees growing upon land, that they will go with the land to the heir, and not to * 151 the *executor. But there are some cases where timber and trees not severed from the land may be regarded as personalty, and as such go to the personal representative. Thus, where the owner of the fee grants the trees standing on land to another, they will thus become personalty; and if the grantee die before they are severed, they will go to his personal representative as part of the personalty.³ So also where the owner in fee-simple sells the land, and reserves the timber or trees, it will be regarded as personalty, and as such go to the personal representative.⁴

3. There is a distinction made in the English cases between such trees standing upon land, as are fit for timber, and such as are not,—the former being regarded as properly belonging to the heir; and when severed by the tenant, during his term, or by the act of a stranger, or by tempest or other providential act, will become the property of the owner in fee, while the latter, including hedges, fruit-trees, and dead or fallen timber, called dotards, if severed during the term, will belong to the tenant.⁵

4. That species of estate in growing crops which is denominated emblements, where the estate determines, without the fault of the tenant, is regarded as mere personalty, and goes to the executor or administrator of the tenant.

(1.) The first inquiry under this head will be in regard to what crops come under the general denomination of emblements. Here it seems well settled, that the term only extends to such crops as are the result of special labor and cultivation, and which commonly compensate such labor within the year. This will include all corn and grain crops, as well as the products of the garden, and other root crops. It has also been held to include hops, which, although they spring from old roots, require annually to be manured and cultivated. But this will not include the fruit of

³ *Stukeley v. Butler*, Hob. 168, 173.

⁴ *Herlakenden's Case*, 4 Co. 62 a. But if the party entitled to the trees afterwards purchase the land, they will become thereby again attached to the land. 4 Co. 63 b.

⁵ *Bewick v. Whitfield*, 3 P. Wms. 266, 268. But the tenant for life is entitled to the interest upon money produced by the sale of land by order of court. *Tooker v. Annesley*, 5 Sim. 235; *Consett v. Bell*, 1 Y. & Coll. C. C. 569. The rule in regard to cutting timber, on timber estates, is discussed by Sir G. Jessell, M. R., in *Honywood v. Honynwood*, L. R. 18 Eq. 306.

trees, or the growth of trees, planted or sown. But, in the case of nurserymen, who plant and cultivate trees for sale, their executors may remove * them from the land as per- * 152 sonalty.⁶ But where a nursery is planted, not for the purpose of sale, but to be transplanted on other portions of the land, it is said it cannot be removed by the executor or administrator.⁷ And it was held that a tenant, not a gardener himself, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord.⁸ But it has generally been considered, that the growing crop of grass, although grown from seed sown that year, and although ready to be cut for hay, cannot be treated as emblements; because, as it is said, although in part the result of cultivation, it is not wholly so, and the proportions are not distinguishable.⁹ But it has been sometimes held, that in regard to the artificial grasses, like clover and sainfoin, and the like, the rule is otherwise. This exception to the rule, however, seems not well settled, even as to clover raised within the year from sowing by the party disseised; and as to crops taken beyond the year, it has been held not to come within the rule of emblements.¹⁰

⁶ *Penton v. Robart*, 2 East, 88, 90, by Lord *Kenyon*, Ch. J.

⁷ *Heath, J.*, in *Wyndham v. Way*, 4 Taunt. 316.

⁸ *Empson v. Soden*, 4 B. & Adol. 655. Nor can the outgoing tenant plough up strawberries planted by himself. *Watherell v. Howells*, 1 Camp. 227.

⁹ *Bayley, J.*, in *Evans v. Roberts*, 5 B. & C. 829, 832.

¹⁰ *Graves v. Weld*, 5 B. & Adol. 105. The subject of emblements is here very learnedly discussed by Lord *Denman*, Ch. J.: "The principal authorities upon which the law of emblements depends are *Littleton*, § 68, and *Coke's* commentary on that passage. The former is as follows: 'If the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egress, and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him.' Lord *Coke*, Co. Litt. 55 a, says, 'The reason of this is, for that the estate of the lessee is uncertaine, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit-trees, or young oaks, ashes, elmes, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield no present annuall profit.' These authorities are strongly in favor of the rule contended for by the defendant's

* 153 * (1 *α.*) The American cases seem to follow substantially the same rule as the English. It has accordingly been held, that growing clover, or hay, are not emblements.¹¹ But all annual crops of corn, grain, roots, &c., raised by "cultivation and manur-
 ance," as it is called, are emblements.¹² So rails distributed over the land for fence, and hop-poles, necessarily used in cultivating the crop, and which were taken down for the purpose of gathering it, and piled in the yard with the intention of being replaced in the season of hop raising, are a part of the real estate.¹³

(2.) The second general inquiry under this head is, what mode of determining the tenancy will confer upon the tenant the right to

counsel ; they confine the right to things yielding present *annual* profit ; and to that year's crop, which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within the rule. In *Latham v. Atwood*, Cro. Car. 515, they were held to be '*like* emblements,' because they were 'such things as grow by the manurance and industry of the owner, by the making of hills, and setting poles : ' that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables. Mr. Cruise, in his Digest I. 110, ed. 3, says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements ; it by no means proves, that the person who *planted* the young hops would have been entitled to the first crop whenever produced.

"On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity are capable of being emblements, except the case of *Kingsbury v. Collins*, 4 Bing. 202, in which teasles were held by the Court of Common Pleas to be so. But this point was not argued, and the court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it *may be*, that *in* the year when the plant is fit to gather, so much labor and expense is incurred as to put it on the same footing as hops. We do not, therefore, consider this case as an authority upon the point in question.

"The note of Serjeant Hill, in 9 Vin. Abr. 368, in Lincoln's Inn Library, which Mr. *Gambier* quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine *after* harvest, whereas here it determined before."

¹¹ *Evans v. Iglehart*, 6 Gill & J. 171, 188 ; *Kittredge v. Woods*, 3 N. H. 503, 504 ; *Parham v. Thompson*, 2 J. J. Marshall, 159.

¹² *Ante*, n. 10 ; *Singleton v. Singleton*, 5 Dana, 87, 92 ; *Penhallow v. Dwight*, 7 Mass. 34.

¹³ *Bishop v. Bishop*, 1 Kernan, 123 ; *Clark v. Burnside*, 15 Ill. 62.

emblems, or an away-going crop, or in other words, in what cases the personal representative may claim the crops growing at the time of the decease of the testator or intestate. As between * the executor and the heir emblems always go * 154 to the former,¹⁴ and the question of what modes of determining a tenancy will give the right to emblems will scarcely occur here, since the claim of the personal representative will not arise except upon the decease of the tenant, which will always give the right to emblems, unless the case of self-destruction may form a possible exception. And that could not be so regarded, unless upon satisfactory evidence of it being done in the full possession of reason, and of a sane mind, which will seldom occur.

(3.) But as a conveyance of the land will also pass the growing crops, so also where the land is devised, it is said they will go to the devisee.¹⁵ So, too, the executor cannot demand the growing crops, as against a dowress, after severance.¹⁶ But in cases of joint tenancy, where one of the tenants deceases before the growing crop is gathered, it will go by survivorship to the other joint tenant, unless where one tenant, by contract with the other, cultivates the whole land.¹⁷

It has often been made a question, upon what grounds of determining a tenancy the tenant shall himself be entitled to an away-growing crop. As before intimated, it is always required that it be determined without the fault of the tenant, as by the act of

¹⁴ *Lawton v. Lawton*, 3 Atk. 13, 16, and note, where the subject of fixtures is extensively discussed.

¹⁵ *Spencer's Case*, Winch, 51. And even where the devisee dies before severance of the crop, it shall go to his personal representative, on the ground that a devise shall be construed most strongly against the deviser. But where it appears by the will that the testator intended the executor to have the emblems, he will be entitled to them. Thus, where the testator having devised his land to A., in fee, provides that his executors should have all his money, &c., stock on his farm, with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust to pay debts and legacies, it was held that the devise of his stock on his farm carried the standing crop of grass growing there at the time of his death, from the devisee to the executors, although there were assets sufficient to pay all the debts and legacies without that aid. *West v. Moore*, 8 East, 339. So also where there is a specific bequest of the crops, it will carry them away from the devisee of the land. *Cox v. Godsall*, 6 East, 604, in n. The rule of the text is maintained in *Gracey, Admr. v. Mellinger*, 30 Legal Int. 192.

¹⁶ 1 Wms. Exrs. 634.

¹⁷ *James v. Portman*, Owen, 102.

God, or of the law, and not by the voluntary and wilful act of the tenant.¹⁸

* 155 * (4.) In regard to the claim of the executor of the husband to emblements, upon land owned by the wife, but in the possession of the husband at the time of his decease, the rule seems to be, that where the crop was sowed by the husband, after the marriage, the personal representative of the husband will be entitled to emblements. But where the crop was sowed by the wife, before the marriage, she will take the same with the land, upon the decease of the husband, by way of survivorship.¹⁹ So upon the death of a tenant by the curtesy, the emblements will go to the executor, or personal representative, the same as in any other case of the determination of a tenancy for life, by the death of the tenant.²⁰ So also upon the determination of a tenancy at will by the death of the tenant.²¹

(5.) Where there is a right to emblements the law gives a right of entry, egress and regress, so far as the same is necessary for the purpose of removing the same. It has sometimes been claimed, that rent should be paid for the land until the removal, but that does not seem well founded.²²

(6.) It has been decided, that where land is sold for the payment of debts, by order of the probate court, the purchaser will hold the growing crops, although sown by a tenant of the heir.²³ Every kind of produce raised annually by labor and cultivation, except growing grass and fruit, are deemed assets, and to be included in the inventory as such.²⁴ Nor can the widow claim to

¹⁸ *Debow v. Colfax*, 5 Halst. 128; *Gee v. Gee*, 2 Dev. & Batt. Ch. 103; *Bevans v. Briscoe*, 4 Har. & Johns. 139. In the last case the rule was extended to a tenant under the tenant for life, where the tenant for life deceased before the crop was gathered. But it must be the decease of the party who sowed the crop to entitle his personal representative to emblements, otherwise the reason of the rule fails. *Grantham v. Hawley*, Hob. 132; *Anon.*, Cro. Eliz. 61. So if the tenant for life die before the crops are sowed, emblements will go to the remainder-man. *Gee v. Young*, 1 Haywood, 17.

¹⁹ 1 Wms. Exrs. 638, and cases cited. The same rule obtains in the American states. *Haslett v. Glenn*, 7 Har. & Johns. 17; *Hall v. Browder*, 4 How. (Miss.) 224.

²⁰ 1 Roper on Husb. & Wife, 35.

²¹ Co. Litt. 556.

²² Plowden's Queries, 239th Query.

²³ *Jewett v. Keenholts*, 16 Barb. 193.

²⁴ 2 N. Y. Rev. Stat. 82, § 6; *Bank of Lansingburgh v. Crary*, 1 Barb. S. C. 542; *Warren v. Leland*, 2 id. 613.

cut grass, or take fruits, even upon her dower, and if she do so she must account for the same to the heir.²⁵

* SECTION VII.

* 156

THE LAW OF FIXTURES, AS BETWEEN THE HEIR AND EXECUTOR.

1. The rule now depends mainly upon the intention of the party in affixing the article to the soil.
2. Most writers upon the subject treat it with reference to the relations out of which such questions are likely to arise.
 - (1.) As between landlord and tenant the construction favors removal by the tenant, where that was the evident intention.
 - (2.) As between executor and heir, vendor and vendee, all erections and fixtures, intended for permanent use on the land, go with the land.
 - (3.) As between the executor of the tenant for life and the remainder-man.
3. The later English cases seem to settle the matter in that country. Cases stated.
4. Statement of some of the American cases. They seem not to follow any clear principle.
5. Enumeration of classes of cases where the decisions have been conflicting.
6. The mode of attaching personalty to the freehold sometimes decides its character as a fixture.
- 7, and n. 16. Illustrations drawn from the reported cases upon different subjects connected with fixtures.
8. Instances illustrating the question among the recent decisions.
9. A late English case between mortgagor and mortgagee.
10. The English courts now regard the question one of intention mainly.
11. The subject of ornamental furniture attached to the walls and foundation considered.
12. The devisee will take the fixtures, the same as the heir, and more extensively in some cases.
13. The tests which are to determine character of fixtures.
 - (1.) The character and use of the article will settle most cases.
 - (2.) When that leaves the case doubtful, custom and usage control.
 - (3.) If there is still doubt, the agreement, expectation, or understanding of the parties may be resorted to.

§ 22. 1. THE full discussion of this topic would carry us much beyond the limits allowable in such a treatise as the present. The inquiry in every case of the kind is, whether the article is attached to the freehold in such a manner, as that it is fairly presumable that it was not intended to be ever separated by the person who placed it there. Hence, in determining what articles are to be regarded as fixtures and what are not, the customs of business, of

²⁵ *Kain v. Fisher*, 6 N. Y. 597. See also n. 24.

husbandry, and the general usages of the country in regard to the subject-matter, will have great influence in the decision, more than the particular mode in which the article is affixed to the soil * 157 or * freehold.¹ So that the old rule of *quicquid plantatur*

¹ This may be well illustrated by different articles. An ordinary grindstone may be placed upon stakes driven firmly into the ground, for convenience of use. So a carpet is firmly nailed to the floor for the same reason. But no one would ever regard either of these articles as fixtures. On the other hand, some kinds of fence are made to slide upon the land, resting upon a frame; and grates and fireplaces are often merely laid into the chimney, and removable without damage or the use of force, as are also window-blinds, and doors even. Yet no one would regard them as any the less a part of the realty. This portion of the ordinary definition of fixtures, "such things as are not susceptible of removal without injury to the freehold," seems in some states to have acquired more controlling effect than it is fairly entitled to have. The case of *Capen v. Peckham*, 35 Conn. 88, 9 Am. Law Reg. N. S. 136, is a somewhat striking illustration of the law of fixtures, upon this point, as at present administered in that state. The plaintiff erected a slaughter-house and placed in it apparatus for handling heavy cattle, by means of the mechanical power of the wheel and axle. The apparatus consisted of two poles, thirty feet in length, and ten inches in diameter, corresponding to the length of the building, and resting at the ends upon the beams of the building, about fifteen feet above the ground. There were four slides or yokes, with a bar across the ends, and the ends of the bow passing through holes in the bar and fastened by keys or pins with hooks attached to the bars. These yokes or bows were placed upon the poles, in an inverted position with the hooks downwards, and were used for hanging the carcasses of slaughtered animals. The wheel was about eight feet in diameter, and the shaft of it about fourteen feet in length, corresponding to the width of the building. The end of the shaft rested upon the opposite plates of the building, about twenty feet above the ground, and a notch was cut in each plate, suitable to hold the shaft in position, and in which the ends of the shaft were placed and revolved. Two large ropes were attached to the wheel with a hook in each and a rope passed round the wheel and connected with the windlass, by means of which they revolved together. The windlass was about three feet in length, and the ends passed through holes in two upright pieces of timber, which were firmly nailed to the building at top and bottom. The building was conveyed through one other to the defendant, and also conveyed by defendant through one other to the plaintiff again, leaving a leasehold interest in the defendant. The premises and apparatus were built and prepared expressly for the purpose of a slaughter-house and had been always so used, and all passed by deed, so far as they passed by any formal conveyance, the deeds describing the land with the appurtenances, and there having been no mention of the apparatus described, in any other way, and no claim that the whole building and apparatus did not pass by the deeds, until the removal of the apparatus by the defendant before surrendering the premises, at the termination of his term.

solo, solo cedit, will now be of but slight weight. And the old case of *Culling v. Tuffnal*, where it was held that a barn * 158

The court held all the articles to be personal property, and not fixtures, except the windlass, which at present they regarded as *prima facie* a fixture, because it was not removable without injury to the building. This seems to us the *ne plus ultra* of this rule of determining the character of fixtures by the mode of annexation, and exceedingly well calculated to illustrate the extent of the rule. The apparatus was confessedly indispensable to the use of the building for the purpose for which it was erected; it was made and fitted to the building, to fit it for that use, and had always passed with the building to successive purchasers, as a necessary part of the building, and without any separate contract from the deed of the realty. It was all a part of the same apparatus and all fitted to, and adapted for, use in this particular building. But still it could all be removed, except the windlass, without any injury to the building. And by the same rule all the flooring in barns for scaffolds of hay, might with equal propriety be removed; and indeed all the flooring, and the sleepers of barns, and the stanchions by which the cattle are fastened, and the bows and pins. In short, by the literal application of this rule, which of course the court did not intend, almost any building might be stripped of much of its essential fitting up.

One invincible rule upon this subject is, that if any portion of the apparatus is a fixture, that will carry the whole, and it is not competent to remove portions of an entire machine or apparatus. Thus in *D'Eyncourt v. Gregory*, Law Rep. 3 Eq. 382, it was held by Lord Romilly, M. R., that tapestry, pictures in panels, frames filled with satin and attached to the walls, and also statues, figures, vases, and stone garden seats, purchased and placed by the owner, and which were essentially a part of the house or of the architectural design of the buildings and grounds, however fastened, or not fastened at all, were to be regarded as fixtures and could not be removed. But it was held, that glasses and pictures not in panels, not being part of the building, and articles purchased, but not affixed to the building, must be considered personalty. And in another case, *Re Richards*, Law Rep. 4 Ch. App. 630, where in iron-works the rolling mills required a large number of iron rolls for their convenient operation, the rolls being of different sizes, and sometimes in duplicate, and where there were also sets of rolls in the mills which had been procured for use there, but required further fitting in order to be used, it was held, that the rolls which had been in actual use formed a portion of the rolling mill, and were consequently fixtures. See post, pp. 168, 169. And in the late case of *Climie v. Wood*, Law Rep. 3 Exch. 257, it was held, as between grantor and grantee, that where a steam engine and boiler was placed in a manufactory by the owner of land before executing a mortgage, for the convenience of carrying on his business, the engine being screwed down to some thick planks, which lay upon the ground, and the boiler fixed in brick-work, the engine and boiler must be regarded as having passed under the mortgage, and could not be removed. And the same rule is maintained in *Cullwick v. Swindell*, Law Rep. 3 Eq. 249. See post, *Walmsley v. Milne*,

erected upon pattens, or blocks, might be removed, but that
 * 159 if it had been let into the * soil it could not have been,
 would now be regarded as resting on no sound distinction.²

2. Some writers have subdivided the question of fixtures into the relations out of which the question ordinarily arises.

(1.) As between landlord and tenant, where the construction is made most favorable to the tenant, for the advancement of good husbandry. But it was said in the early cases,³ that there appears to be a distinction between annexations to the freehold, for the purposes of trade, and those made for the purposes of agriculture, and better enjoying of the immediate profits of the land, in regard to the tenant's right to remove the same. But that distinction is not much regarded, of late, in the English courts; and seems never

7 C. B. N. s. 115; s. c. 6 Jur. N. s. 125. The keys in a house pass as a portion of the locks. But in *Blethen v. Towle*, 40 Me. 310, a distinction seems to be made between stoves laid away for the summer and those remaining in the place where used; that the former are personalty, and that the latter pass under a deed or levy as fixtures. The general course of decision has been, so far as we know, to regard stoves not fixed to the freehold by brickwork as personalty. And it could surely make no difference in regard to fire-boards, whether they were in use or laid away for the convenience of using the fire-place for fire. And the same rule will doubtless apply to stoves. If fixtures, when in use, they are none the less so when laid away for the summer. And the same rule will apply, doubtless, to double windows. We never could see any sufficient reason why stoves, which are procured and put up in a dwelling, and which are indispensable to its constant use, should not be regarded as fixtures. But the rule seems to be otherwise. But the rule that a temporary severance of fixtures works no change in their character has been settled from a very early day. *Wystow's Case*, 14 H. 8, 25 b, cited in *Liford's Case*, 11 Co. 50 b; *Queen v. Wheeler*, 6 Mod. 187. This was so decided in *Bishop v. Bishop*, 11 N. Y. 123, in regard to hop-poles, which had been in use upon the land; but at the time were piled in heaps upon the land, during the harvesting of the crop, and until the next season. See also *Wadleigh v. Janvrin*, 41 N. H. 503.

² Bull. N. P. 34.

³ *Elwes v. Maw*, 3 East, 38; s. c. 2 Smith Lead. Cas. [99], 262; *Horn v. Baker*, 9 East, 215; s. c. 2 Smith Lead. Cas. [122], 262. In the former of those cases, which is still regarded as a leading one upon the subject, it was decided, as between landlord and tenant, that where the tenant erected, at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled and let into the ground, he could not remove the same even during his term, although he thereby left the premises in the same state as when he entered.

to have gained much foothold in this country, where agriculture is regarded as one of the most important public interests. In the case of *Elwes v. Maw*, Lord *Ellenborough*, Ch. J., considered that the law, at that time, as indicated by the prior cases,⁴ came to this, "That where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle), was * an accessory to a matter of a personal nature, that it * 160 should be itself considered as personalty." But this, like many other rules upon the subject, will afford but slight aid in deciding the multiplicity of questions arising in the relation of landlord and tenant. The true rule, as between landlord and tenant, seems to be, that all annexations and erections, made by the tenant, for temporary convenience of enjoying the premises, and with the evident purpose of removal, may be disannexed during the term, where that can be done, without sensible injury to the other erections, and where the removal is consistent with the known usages of the business.

(2.) In regard to the law of fixtures, between the heir and the executor, the construction has always been more strict in favor of the inheritance. In this relation it seems that nothing which was erected for the permanent use and advantage of the land or buildings, and which, at the time of its erection, was intended to remain permanently upon, or attached to, the soil, can ever be removed by the executor. And the same rule, substantially, obtains between grantor and grantee, or vendor and vendee; and equally between mortgagor and mortgagee.

(3.) The third case named by the judges and text-writers, as between the executor of the tenant for life and the remainder-man, will rest much upon the same ground as that between landlord and tenant. For the tenant for life should at least have the same right, which any other tenant has, to hold any thing of a personal nature, temporarily affixed to the freehold, which was not designed by him to constitute a permanent fixture, and which could be removed without essential injury to the permanent structures upon the land.

3. But to return from a consideration of these different classes to the general question, it seems to be now reasonably well settled in the English courts, the matter having received a very thorough

⁴ *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Ambler, 113; *Lawton v. Salmon*, 1 H. Black. 259, note (b).

discussion in the House of Lords in a somewhat recent case.⁵ It was here held, that where the owner of the land in fee, for the purpose of better enjoyment of the land, erected upon and affixed to the freehold certain machinery, such as is in use in working coal and iron mines, the purpose for which this was erected, it will go to the heir as part of the real estate. And it was further held,

that if the corpus of the machinery belongs to the heir, all
 * 161 that * belongs to that machinery, although more or less capable of being detached from it, and of being used in such detached state, to a greater or less extent, must, nevertheless, be considered as belonging to the heir. And in a still later case,⁶ this question is carefully considered by Vice-Chancellor *Wood*, in regard to the machinery in use in a copper-roller manufacturer's works. It is here decided, that even in regard to manufactures, all articles fixed to the freehold, whether by screws, solder, or by any other permanent means, or by being let into the soil, partake of the nature of the soil, and will descend to the heir, or pass by conveyance of the land; that the rule of law by which fixtures are held less strictly, when erected for manufacturing purposes, has no application to fixtures erected by the owner of the land in fee; that machinery standing merely by its own weight does not become a fixture. But when part of a machine is a fixture, and another and essential part of it is movable, the latter also shall be considered a fixture.⁷

4. There is no great uniformity in the decisions in the different American states. In some of the states almost all kinds of machines which are complete in themselves, and which are susceptible of use in one place as well as another, and which do not have to be fitted or accommodated to the building where used, and which are fixed to the building to give the machinery steadiness, are held to be personalty. Of this character are carding machines, looms, and other machinery used in manufacturing cloth.⁸ But there are

⁵ *Fisher v. Dixon*, 12 Cl. & Fin. 312.

⁶ *Mather v. Fraser*, 2 Kay & Johns. 536.

⁷ *The Met. Co. Society v. Brown*, 26 Beav. 454.

⁸ *Tobias v. Francis*, 3 Vt. 425; *Gale v. Ward*, 14 Mass. 352; *Walker v. Sherman*, 20 Wend. 636. The same principle is still strenuously maintained in Vermont, with more learning and ingenuity than soundness, we sometimes fear. *Hill v. Wentworth*, 28 Vt. 428; *Fullam v. Stearns*, 30 Vt. 443. But in Massachusetts the tendency seems to be somewhat more in the direction of the English cases. See n. 9; *Yale v. Seely*, 15 Vt. 221. See *Preston v. Briggs*,

many other American cases by which any kind of machine * permanently attached to or erected in a building for man- * 162 ufacturing purposes has been treated as a fixture, and not removable, either by the vendor or mortgagor, or by the executor of the owner in fee.⁹ There are, unquestionably, numerous cases, both English and American, where, as between landlord and tenant, the latter has been allowed to remove almost any kind of machinery, erected by himself with intention to remove the same. Although, under ordinary circumstances, the same kind of machinery, in the same situation, if placed there by the owner in fee, would have been regarded as constituting a permanent fixture. Thus it has been held, that an engine, put in a saw-mill by the mortgagee in possession, who is but a trustee, did not thereby become a fixture.¹⁰ But it seems to have been held in an early case, that where the agent of the owner of a grist-mill placed his own millstone and mill-irons in the mill, they thus became the property of the owner of the mill, as part of the freehold, and could not be again separated therefrom, without the consent of the owner.¹¹

5. There are a considerable number of subjects, in regard to which the cases are by no means in agreement with each other. Thus, boilers and large kettles set in brick and mortar, and indispensable to the permanent use of the building and machinery with which they are connected, at least for present purposes, have nevertheless been regarded as mere personalty.¹² But this view is generally dissented from in the American states,¹³ although it has

16 id. 124 ; *Leland, Admr. v. Gassett*, 17 id. 403 ; *Powers v. Dennison*, 30 Vt. 752. But where a tenant of a public house erected a ballroom, for the convenience in the use of the premises, upon posts slightly imbedded in the ground and removable without injury to the freehold, it was held to be a removable trade fixture. *Dombony v. Jones*, 19 N. Y. 234. A personal chattel becomes a fixture, so as to form part of the real estate, when it is so affixed to it as not to be removable without injury thereto, whether the annexation were for use, or for ornament, or out of mere caprice. *Providence Gas Co. v. Thurber*, 2 R. I. 15.

⁹ *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 314 ; *Richardson v. Cope-land*, 6 Gray, 536 ; *Baker v. Davis*, 19 N. H. 325 ; *Murdock v. Harris*, 20 Barb. 407 ; *Rice v. Adams*, 4 Harring. 332.

¹⁰ *Cope v. Romeyne*, 4 McLean, 384.

¹¹ *Goddard v. Bolster*, 6 Greenl. 427.

¹² *Wetherby v. Foster*, 5 Vt. 136 ; *s. p. Hill v. Wentworth*, 28 Vt. 428.

¹³ *Union Bank v. Emerson*, 15 Mass. 159.

been said other cases confirm the rule, as first declared in *Wetherby v. Foster*.¹⁴ But we cannot believe there is any just ground to question, that kettles and boilers fastened in brickwork for permanent use, and which cannot be removed without moving the masonry, must be treated, as between executor and the heir, as fixtures.

6. There are, no doubt, a large number of cases in regard to machinery and other personalty, where the question of fixture or * not has been determined, to a great extent, by the manner in which it was attached or fastened to the freehold. And it has often been said, that machinery, neither fastened nor adapted to the freehold, does not become a fixture.¹⁵ But this feature must be regarded as rather accidental than decisive in the case; and especially, as is often the fact, where the fastening of the machinery to the building is done to give it greater steadiness, and is therefore no indication of a purpose of attaching it permanently to the freehold. Where the fastening is of the latter character, it may properly enough be regarded as indicative of an intention to thereby attach it permanently to the realty, but this is not the ordinary case.

7. There has been considerable controversy, first and last, in regard to many articles, like stoves and furnaces, which are indispensable to the use of dwellings, in high latitudes, and which are obtained and intended for permanent use in the places where found, and which would therefore, upon general principles, be justly enough regarded as fixtures; and that is the more common rule in regard to furnaces, even where they are portable, and in no way permanently attached to the realty. But in regard to stoves the rule is now entirely well settled, that they are to be regarded as mere personalty, unless laid in brick and mortar, or in some other way permanently attached to the freehold.¹⁶

¹⁴ *Reynolds v. Shuler*, 5 Cow. 323; *Raymond v. White*, 7 Cow. 319.

¹⁵ Ante, pl. 3, and note.

¹⁶ *Squire v. Mayer*, 1 Wms. Exrs. 694; *Blethen v. Towle*, 40 Maine, 310. And a cistern standing on blocks in the cellar, although in some sense a fixture, may be removed by the tenant, if placed there for his own temporary convenience, and with the purpose of removing the same at the end of his term. *Wall v. Hinds*, 4 Gray, 256. Indeed there are many things, such as gas-fittings, pumps, and sinks, and the like, which if put into a tenement at the beginning of the term, by the landlord, will remain his at the end of the term, and will pass by deed or mortgage. But if placed there by the tenant,

* 8. There are a considerable number of late English deci- * 164
sions upon the general question of fixtures, but we are not

during his term, they may be removed by him at the end of it. The same has been held in regard to a knocker upon the door, and a crane in the chimney. See *Grymes v. Boweren*, 6 Bing. 437; *Elliott v. Bishop*, 10 Exch. 496, 512. And manure in heaps belongs to the executor, or to the tenant, and is no part of the realty. *Higgon v. Mortimer*, 6 Car. & P. 616; 1 Wms. Exrs. 650. But if it be spread upon the land it becomes realty, of course, and even where laid in heaps upon the land for spreading. *Fay v. Muzzey*, 13 Gray, 53. Some things merely resting upon the soil will no doubt be regarded as fixtures, from the nature of their use, such as troughs for watering cattle. But it was held, that a large wooden box, heavy and lined with zinc, which was erected in the room of a tavern for an ice-chest, and which was incapable of being removed from the same without being taken to pieces, was nevertheless personalty, and did not pass by deed of the premises. *Park v. Baker*, 7 Allen, 78; *Antoni v. Belknapp*, 102 Mass. 193. But the New York Court of Appeals, in *Snedeker v. Warring*, 2 Kernan, 170, held that a statue, erected as an ornament to grounds, may pass by deed of the realty, although not fastened to the base upon which it rested. So also in the same case, it was held, that a sun-dial, erected upon a permanent foundation of stone, without being in any way fastened to it, was a part of the real estate, although removable without difficulty. And although there is an early case where it was decided that a cider-mill might be removed as personalty, that has not been followed; *Wadleigh v. Janvrin*, 41 N. H. 503; and the same rule is here applied to the fixtures in a barn, such as the stanchion-blocks, chains, &c., which had been taken out for the convenience of repairing the barn, but were nevertheless held not divested of their character of fixtures. So also in another late case in New Hampshire (*Burnside v. Twitchell*, 43 N. H. 390), it was held, that saw-mill saws, purchased by the owner of the mill for use therein, and attached to the mill and in use there, without any intention of removing them at the time, became parts of the realty, and passed by a conveyance of the land, even when agreed to remain the property of vendor till paid for. *Davenport v. Shoats*, 43 Vt. 546. And the same was here declared, in regard to leather belting in use in the mill, and indispensable to connect the machinery with the motive-power. But it was also held, that the fact that the owner of the mill had purchased saws, with the purpose of using them in the mill, and had kept them in the mill for a long time with that intent, if not actually attached to the mill, would not change their character of personalty. We might multiply cases upon this subject, from the American reports, almost indefinitely; but that would not be desirable in a book of this character. Rails made into fence are, of course, a part of the realty. *Mott v. Palmer*, 1 Comst. 564. But before being distributed upon the land rails are mere personalty. *Robertson v. Phillips*, 3 Iowa, 220. A saw-mill built on timbers with a view to be removed from place to place, where the timber was, is mere personalty. *Brown v. Lillie*, 6 Mo. 244. An engine and machinery attached to a sugar-house is real estate. *Bank v. Knapp*, 22 La. Ann. 117. But when detached,

aware that any new principle is involved in them. Greenhouses, built in a garden, and constructed of wooden frames fixed by mortar to foundation walls of brickwork, were held to be fixtures, and not removable by the occupier who built them.¹⁷ A boiler, too, built into the masonry of the greenhouse, becomes immovable; but the pipes of a heating apparatus, connected with the boiler by screws, are removable.¹⁷ And it has been held that greenhouses, forcing-pits, and hot-bed frames, erected by nursery gardeners for the purposes of their trade, may, so far as not consisting of brickwork, be removed by them at the expiration of their lease.¹⁸ And upon the demise of a music-hall, chandeliers and seats attached by the lessee by screws are removable.¹⁹

it is personalty. *Ib.* A steam saw-mill may be removed by the tenant who erected it; but, if not removed at the end of the term, it becomes real estate. *Perkins v. Swank*, 43 Miss. 349. Steam-boilers used in a saw-mill are not fixtures, as between the lessor of the boilers and one who purchased the plantation of the lessee of the boilers. *Slack v. Gay*, 22 La. Ann. 387. A factory bell and the blower to a forge held parts of the realty. *Alvord Carriage Manuf. Co. v. Gleason*, 36 Conn. 86. Bowling-alleys put up by lessee held removable, although it would injure the building. *Hanrahan v. O'Reilly*, 102 Mass. 201. Marble slabs not secured to the brackets removable by tenant; but not so of a bell fastened up in the cupola of the building. *Weston v. Weston*, 102 Mass. 514. A glass case bought by the tenant of an eating-house for use there, and so of a mirror bought for the same use, and both secured or nailed to the walls of the room, are not fixtures; so also of gas fixtures. And if the landlord prevents their removal, he is liable in trover for the same. *Guthrie v. Jones*, 108 Mass. 191. But a counter and bar erected by the tenant were regarded as trade fixtures, and, not being severed from the freehold by the tenant, he could not maintain trover for them. *Ib.* But many articles mentioned above as removable by tenants, if procured by them, during the term, such as marble slabs resting upon, but not fastened to, brackets, would clearly pass with the realty as between heir or devisee and the executor, or between vendor and vendee.

¹⁷ *Jenkins v. Gething*, 2 Johns. & Hem. 520.

¹⁸ *Syme v. Harvey*, 24 Sess. Cas. 2d series, 202.

¹⁹ *Dumergue v. Rumsay*, 10 Jur. N. S. 155; s. c. 10 W. R. 844. But it was held in the Exchequer Chamber, where the judgment was reversed, that where the lease contained a condition, that the fixtures to be put in by the tenant should not be removed during the term, and that if any writ of execution should be levied upon the premises it should be lawful for the lessor to re-enter, and to seize and retain for her own, all fixtures, whether tenant's or otherwise; that this condition defeated the right of the execution creditor of the lessee to levy upon tenant's fixtures. *Dumergue v. Rumsay*, 10 Jur. N. S. 155.

* 9. In a recent case²⁰ in the Common Pleas, it appeared * 165 that the owner of the inheritance annexed thereto fixtures (which would, in the ordinary case of landlord and tenant, be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate; it was held they would become part of the freehold. In this case the owner of the fee mortgaged it, and afterwards erected certain buildings thereon, to which for the more convenient use of the premises in his business of an innkeeper, brewer, and bath-proprietor, he affixed a steam-engine and boiler, a hay-cutter, malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way, and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or floors, for the purpose of steadying them, but were all capable of being removed without injury, either to themselves or the premises. The engines were used also to supply water to the baths, and to put the other machines in motion; and the whole were subservient to the business carried on by the mortgagor; and it was held that these erections became fixtures, and passed with the land to the assignee of the mortgagee.²¹

10. In a somewhat recent case,²² the Court of Common Pleas * held, that it was a question of evidence, depending * 166 on circumstances and the intention of the parties, whether A.'s chattel, fixed on B.'s soil, becomes part of the soil, or remains the chattel of A.

²⁰ *Walmsley v. Milne*, 7 C. B. N. s. 115; s. c. 6 Jur. N. s. 125.

²¹ In the case of *Walmsley v. Milne*, supra, the question of fixtures and the cases are considerably discussed, and the following proposition maintained: That assuming the fixtures in question to be removable, as between tenant for years and landlord, yet assuming them to be trade fixtures, they were not removable by the mortgagor, in the absence of all evidence of such an expectation and understanding, between the mortgagor and the owner of the mortgage. And in the case of *Butler v. Page*, 7 Met. 40, it was held that fixtures erected on the mortgaged premises by the mortgagor become so annexed to the freehold, that they cannot be removed by him until the mortgage debt is paid, and the removal of them by the mortgagee after the mortgagor's death does not vest the property in his personal representative. See also *Pierce v. George*, 108 Mass. 78.

²² *Lancaster v. Eve*, 5 C. B. N. s. 717; 5 Jur. N. s. 683.

11. It has sometimes been made a question how far pier-glasses and other mirrors, pictures, and matters of that character, could be removed where they have been let into and formed a portion of the wainscoting, and this was done by the owner of the fee, at the time of making the erections. In *Beck v. Rebow*,²³ it was said by Lord-Keeper *Cowper*, that hangings and looking-glasses were only matters of ornament and furniture, and not to be taken as part of the house or freehold. But it is suggested by *Mr. Williams*,²⁴ that where such articles of furniture are so framed into the house as to take the place of panels, they shall go to the heir, because they could not be removed by the executor without disfiguring the house. But it seems entirely well settled, that marble chimney-pieces, or any other pieces of ornamental furniture, which are placed in a dwelling by the tenant, by way of ornament, may be removed by him during the term.²⁵ And hangings, tapestry, and iron backs of chimneys, have been held removable by the executor,²⁶ as not belonging to the heir.

12. There seems no question that the devisee of real estate will take it with all fixtures fairly belonging to it, the same as the heir. And there are some cases in the books, where, from the language of the will and the surrounding circumstances, works for carrying on mechanical or manufacturing business have been devised, that a clear intendment will sometimes arise, that it must have been the purpose of the testator to have the machinery and tools, indispensable to carrying on the business, go with the realty.²⁷

13. In conclusion, without going more into detail, it may be safely said, that in determining whether a particular article is to be regarded as a fixture or not, a few general considerations may commonly be regarded as decisive.

(1.) The character and use of the article will commonly indicate, with more or less clearness, whether, according to the general custom of the country, it is to be regarded as a fixture.

* 167 * (2.) As to those classes of articles where there is fair ground for debate, it should first be inquired, what is the general practice and usage of the country. This will generally be found of a controlling character.

²³ 1 Peere Wms. 94.

²⁴ 1 Executors, 657.

²⁵ *Dudley v. Warde*, Amb. 113.

²⁶ *Harvey v. Harvey*, 2 *Strange*, 1141.

²⁷ *Wood v. Gaynon*, Amb. 395.

(3.) If neither of the foregoing rules afford any clear indication in regard to the matter, resort must be had to the time and purpose of the erection, and the expectation or understanding of the parties interested in opposite directions at the time of the erection of the structure, or the attachment of the article to the freehold. There will commonly arise out of this inquiry some clear guide to the solving of all doubt. But it should always be borne in mind, that this latter mode of solving the question is only to be resorted to where both the former ones fail to afford any satisfactory solution. For the practice which has obtained, in some of the American states, of allowing houses and barns and mills, to be treated as mere personalty, although built in the ordinary mode, upon the ground of some oral contract, expectation, or understanding among the parties interested therein, cannot fail to prove in the end of evil consequence and tendency, and cannot be too decidedly repudiated by all lovers of good order and sound law.²⁸

²⁸ *Leland v. Gasset*, 2 Wash. Dig. of Vt. 335, 336; s. c. 17 Vt. 403, on another trial, *Preston v. Briggs*, 16 Vt. 124; *Van Ness v. Pacard*, 2 Peters, S. C. 137. And such an article as a pump, as before intimated, if erected by the owner of the land, will go with the land by deed or mortgage, or descent or devise. But if placed there by a tenant it is removable. *McCracken v. Hall*, 7 Ind. 30. So in regard to other doubtful cases, the contract of the parties is of great weight. *Brearley v. Cox*, 4 Zab. 287. A stove placed in a chimney place without legs, and with a short funnel, bricked around, so that it cannot be removed, probably, without disturbing the brickwork, was held to be part of the realty. *Tuttle v. Robinson*, 33 N. H. 104. So buildings erected by the husband upon the wife's land become so far a part of the realty, that they do not pass to the administrator of the husband. *Washburn v. Sproat*, 16 Mass. 449.

And in *re Richards*, Law Rep. 4 Ch. App. 630, decided by Lord Justice *Giffard*, ante, n. 1, where, in ironworks, there were weighing machines sunk in holes in the floor of the factory, each machine resting on brickwork at the bottom of the hole, and the sides of the hole being faced with brickwork, and the machines were not fastened in any way to the brickwork, but rested merely by their own weight, they were held not to be fixtures. There were also imbedded in the floor of the factory, which was covered with iron flooring plates, some long iron plates called "straightening plates," which were used for straightening bars of iron, when drawn out of the furnace. These straightening plates were laid upon a platform of brickwork, and were held to be fixtures.

Where a lease expires by the bankruptcy of the tenant, and the trade fixtures are not removed before the expiration of the lease, they become the property of the landlord. *Pugh v. Aston*, 17 W. R. 984. See also *Bidder v.*

THE SEPARATE PERSONAL ESTATE OF THE WIDOW.

1. The executor presumptively entitled to all the personal estate of the wife in the husband's possession at the time of his decease.
2. If the wife claims to retain it against the husband, she must do it on special grounds.
 - (1.) She may do this on the ground of a marriage settlement.
 - a. Forms of expression sufficient to create separate estate in the wife.
 - b. The cases seem to require the most unequivocal language.
 - c. Discussion of the English cases bearing upon the point.
 - (2.) Any limitation upon enjoyment in a gift to unmarried women holds under future coverture.
 - (3.) Husband may make settlement upon wife, either before or after marriage.
 - (4.) If made upon new and independent consideration, cannot be questioned by creditors.
 - (5.) Gifts by husband and wife to each other during coverture, sustained.
 - (6.) So the wife may claim allowance as pin-money, against executors, and sometimes against creditors.
 - (7.) The paraphernalia of the wife, in America, exempt from all claim of the husband's executors or creditors.
 - (8.) The rule of law upon the subject in Connecticut.
 - (9.) The same in Massachusetts.
 - (10.) There must be something to show that the husband holds in trust for the wife.
 - (11.) The wife has no equity to a settlement out of the estate of which her husband is defaulting executor.

§ 23. 1. MARRIAGE being *primâ facie* a gift to the husband of all the personal estate of the wife which she has at the time of the marriage, or which accrues during the coverture to her in her own right, the executor will have the same presumptive right to the personal estate of the wife as of the husband.¹

Petroleum Co., id. 153. Where the testator gave his real and leasehold estate, stock-in-trade, money at the bank, good-will, book debts, and effects belonging to his business to his son, and charged the estate with the payment of legacies, and the estates were sold to pay the legacies and bought in by the son, it was held that the fixtures passed to the son under the bequest of "effects belonging to the business." *Pinder v. Pinder*, 18 W. R. 309; s. c. L. R. 8 Eq. 626.

¹ Co. Litt. 351 b. And it makes no difference whether the wife has the legal, or only an equitable, property in the thing. *Osborn v. Morgan*, 9 Hare, 432.

2. If, therefore, the wife claims to retain, as against the executor of the husband, any of the personal estate in the possession of the * husband, at the time of his decease, she must do it * 169 upon special grounds. This she may do upon the grounds, —

(1.) Of a marriage settlement before the marriage, by which her personal estate was placed in the hands of trustees for her own separate use, with the consent of her husband.² And it may be done equally by a settlement made after marriage in pursuance of a parol contract made before the marriage, and recited in the settlement, as the ground and consideration thereof.³ But if the husband survive the wife, he will be entitled to the avails of property settled to the separate use of the wife, in his marital right, and without taking administration of her estate.⁴ And it does not seem requisite, that there should be trustees, in order to secure the separate estate of the wife, for in cases where none are named, if the property, although under the control of the husband, is by him treated as the separate estate of the wife, and as such kept distinct from his own estate, courts of equity will protect the rights of the wife.⁵

a. There has been considerable discussion in the books, as to the form of a settlement, whether by deed or will, which will be sufficient to secure the estate to the wife in the event of her surviving the husband. And while it is said that a trust for the wife's own use and benefit is not a trust for her separate use,⁶ it seems to be agreed that any language which clearly indicates a purpose that the estate shall be and remain under the separate control of the wife, will be sufficient to exclude the marital rights of the

² *Jarman v. Woolloton*, 3 T. R. 618.

³ *Dundas v. Dutens*, 2 Cox, 235. But in the later case of *Warden v. Jones*, 2 DeG. & J. 76, it was said that a settlement made after marriage, even although in consummation of a contract made before, but not recited therein, will be regarded as voluntary, and not binding upon creditors. This case has however been questioned in England. See Redfield's ed. Story Eq. Jur. § 987 a, and note. The cases bearing upon this general question are, *Spurgeon v. Collier*, 1 Eden, 55, 61; *Lassence v. Tierney*, 1 Mac. & Gor. 551; *Randall v. Morgan*, 12 Vesey, 67, 73; *Surcome v. Pinniger*, 3 DeG., M. & G. 571; *Jorden v. Money*, 5 H. Lds. Cas. 185; *Page v. Horne*, 11 Beav. 227; *Kinderley v. Jervis*, 22 Beav. 1; *Wildman v. Wildman*, 9 Vesey, 174; *Parker v. Brooke*, id. 583; *Ryland v. Smith*, 1 My. & Cr. 53.

⁴ *Molony v. Kennedy*, 10 Sim. 254.

⁵ *Beales v. Spencer*, 2 Y. & C. C. C. 651.

husband. Thus the expressions, "to be at the wife's own
 * 170 disposal," * or "to be enjoyed independent of her husband,"
 or "her receipt to be a good discharge," have been held
 sufficient.⁶

b. In the case of *Massey v. Parker*,⁷ the cases are somewhat extensively reviewed by Sir *C. Pepys*, M. R., and the rule declared, "that the cases require very distinct and unequivocal expressions to create a separate interest in the wife." And the cases are here brought out, with the language of the judges, very clearly indicating the most urgent necessity of the most unequivocal language to secure personal estate to the separate use of the wife.⁸ From all the cases it may perhaps fairly be said, that in order to secure personal property to the separate use of the wife, there must be the use of language clearly indicating a purpose on the part of the grantor or donor to exclude the marital rights of the husband. This will always be sufficiently indicated, as to the corpus of the estate, by committing it to the care of trustees; and in such cases very slight indications of an intention that the wife shall have the exclusive control of the income, will be sufficient. But where the property goes into the possession of the husband the language of the settlement, or instrument of donation, should be very clear, to give the wife a separate property in mere personalty; or else the practical construction should be fixed, by the fact of the husband having all along kept the estate separate.⁹

c. Our own views upon this question are carefully stated, in a recent case,¹⁰ in terms which we beg leave here to repeat. The general principles of equity law seem most unequivocally to sustain the right of the wife to her separate property, whether acquired before or during the coverture, and, in the latter case, whether the acquisition is the result of gift or inheritance, or is the product of her own personal earnings. In every such case she will hold

⁶ 1 Wms. Exrs. 668.

⁷ 2 My. & K. 174.

⁸ *Tyler v. Lake*, 2 Russ. & My. 183, where the Lord Chancellor says, "The husband is not to be excluded except by words which leave no doubt." s. c. before Vice-Chancellor *Shadwell*, 4 Sim. 144. See also *Stanton v. Hall*, 2 Russ. & My. 175.

⁹ *Porter v. Bank of Rutland*, 19 Vt. 410, where the cases are extensively reviewed by *Davis*, J.

¹⁰ *Richardson v. The Estate of Merrill*, 32 Vt. 27; post, § 30, pl. 7, and cases cited. See *Hathaway v. Yeaman*, 8 Bush, 391; *Dayton v. Fisher*, 34 Ind. 356.

against the husband and his heirs, and generally against his * creditors, so long as the husband allows the wife to * 171 keep the property separate from the general mass of his own estate, although his own name may be used in the formal conduct of the business, unless in the case of creditors this may lead to a false credit on the part of the husband.¹¹ The case of *Slanning v. Style*,¹² is a strong one in point, in regard to the separate earnings of the wife during the coverture. And where the wife upon her marriage reserves the right to dispose of her personal estate, and a subsequent concession to that effect by the husband has been regarded as equivalent, it was held that all the personal estate of which the wife died possessed was to be taken to be her separate estate, or the produce of it.¹³ In *Sir Paul Neal's Case*, cited in *Herbert v. Herbert*,¹⁴ as early as 1692, it was decided, that if a "woman has pin-money, or a separate maintenance settled upon her, and she, by management or good housewifery, saves money out of it, she may dispose of such money, so saved by her, or of any jewels, &c., bought with it, by writing in nature of a will, if she die before her husband, and shall have it herself if she survive him; and such money, jewels, &c., shall not be liable to the husband's debts." So, too, if the wife, in the absence of the husband, carry on trade in millinery and support herself and children, the capital being furnished by her friends, although the business be carried on in the name of the husband, the avails will be regarded as the separate estate of the wife, and chancery will restrain the husband from interfering with it.¹⁵ These principles have been followed and enforced by the courts of equity until the present day. And it may now be regarded, we think, as fully settled, that in a case like the present, if the husband, until his death, suffer the wife to maintain her separate estate and so treat it himself, it must be so regarded after his death, and the personal representative is not called upon to take notice of it, in the settlement of the husband's estate. And if by accident the securities are mixed with those of the husband, in the same general deposit, but in a separate parcel, whereby they are put into the inventory of the husband's estate, as in the present case, it is nevertheless the duty * of the administrator to restore them, or the avails * 172

¹¹ 2 Story's Eq. Jur. § 1387; 2 Roper, Husband and Wife, 171-176.

¹² 3 P. Wms. 334, 337.

¹⁴ Prec. in Ch. 44.

¹³ *Gore v. Knight*, 2 Vernon, 535.

¹⁵ *Cecil v Juxon*, 1 Atk. 278.

of them, to the wife. That is what we understand was done in the present case.

(2.) It has sometimes been made a question, how far limitations upon the enjoyment of a gift to an unmarried woman will control the enjoyment of the gift in the event of any subsequent marriage. But in the case of *Tullett v. Armstrong*,¹⁶ that question seems to be put at rest by the elaborate opinion of Lord Chancellor *Cottenham*. It was there held, that if property be given or settled, to the separate use of a woman unmarried when the settlement or gift takes effect, and she be prohibited from anticipating it, it will, if not alienated by her when discoverd, be enjoyed by her as a separate estate, during any coverture or covertures to which she may be afterwards subject, and she will, during the existence of such after-coverture, be unable to anticipate it.

(3.) So the husband may before marriage make a settlement, out of his own property, upon the wife, to her separate use, and it will be valid, unless fraudulent as to creditors.¹⁷ And the same is true of a postnuptial settlement upon the wife, made by the husband. It will be good as to all except creditors and bonâ fide purchasers, and as to creditors, unless fraudulent as to their rights. But as such settlements, after marriage, seldom occur, except as a safeguard against the contingencies of business, it will require close scrutiny to see that no existing or contemplated wrong against creditors is thereby suffered. The question has generally been made to turn upon the amount of the husband's property relatively to his indebtedness, at the time of making the settlement of property upon his wife. If he still retain ample means for the payment of all existing and contemplated debts, the settlement will be entirely valid even as to existing creditors, but otherwise not.¹⁸ It is regarded as a badge of fraud, where the husband

¹⁶ 4 My. & Cr. 377. The rule seems to be different in Pennsylvania. *Hammersley v. Smith*, 4 Whart. 126; *Hemphill v. Hurford*, 3 W. & S. 216; *Craig v. Watt*, 8 Watts, 498; *Quigley v. Commonwealth*, 16 Penn. St. 353.

¹⁷ *Campion v. Cotton*, 17 Vesey, 264; *Brown v. Jones*, 1 Atk. 188, 190.

¹⁸ *Brackett v. Waite*, 4 Vt. 389, where the cases are extensively discussed by *Baylies, J.* See also *Lush v. Wilkinson*, 5 Vesey, 384; *Townsend v. Westcott*, 2 Beav. 340; *Skarf v. Soulby*, 1 Macn. & G. 364. The existence of debts otherwise secured, or which the settlement provides shall be paid, will not affect such settlement. *Stephens v. Olive*, 2 Br. C. C. 90; *George v. Milbanke*, 9 Vesey, 190, 194.

* reserves the power of revoking the settlement, or continues in possession of the estate.¹⁹ * 173

(4.) But where the settlement upon the wife by the husband is made upon some valid and distinct consideration, it will not be held fraudulent as to creditors even. Thus, if made in consideration of an advancement by the father or friends of the wife,²⁰ or an increase of portion falling to the wife, or in consideration of the wife relinquishing her right to dower, or her jointure, or property settled to her separate use, the settlement will be valid unless greatly exceeding the consideration.²¹

(5.) If the wife direct the income of her separate estate to be paid to her husband, it can never be reclaimed to her separate use.²² And gifts to the wife by the husband during coverture are generally sustained.²³ And stock, purchased by the husband in the joint names of himself and wife, will go to the wife by survivorship.²⁴

(6.) Gifts by the husband to the wife by way of pin-money, as it is called, become the exclusive property and estate of the wife, and the executor of the husband has no claim upon it.²⁵ This will include such profits as the wife may derive from the sale of butter, eggs, poultry, pigs, fruit, and such other similar matters as the husband allows her to take for her own use.²⁶ But it has sometimes been held that the wife's pin-money, when of considerable amount, may be charged with the husband's debts, although exempt from all control of the husband or any one claiming under him.²⁷ But such a distinction would seem without any just foundation, unless there was reason to suppose that the allowance was * made to enable the wife to secure an unreasonable amount * 174 out of her husband's estate, to the unjust detriment of his

¹⁹ 1 Wms. Exrs. 671, 672.

²⁰ *Colville v. Parker*, Cro. Jac. 158.

²¹ *Cottle v. Fripp*, 2 Vern. 220; *Hewison v. Negus*, 16 Beav. 594; *Ward v. Shallet*, 2 Ves. Sen. 16.

²² *Caton v. Rideout*, 1 Macn. & G. 599. But see *Darkin v. Darkin*, 17 Beav. 578.

²³ 1 Wms. Exrs. 675; *Mews v. Mews*, 15 Beav. 529.

²⁴ *Vance v. Vance*, 1 Beav. 605; *Rider v. Kidder*, 10 Vesey, 360; and Mr. Beames's note to the case of *Lorimer v. Lorimer*, id. 367; *Searing v. Searing*, 9 Paige, 283.

²⁵ See remarks of Lord *Brougham* in *Howard v. Digby*, 8 Bligh, 224; s. c. 2 Cl. & Fin. 634.

²⁶ *Willson v. Pack*, Prec. Ch. 295.

²⁷ *Ibid.*

creditors. The right of the wife to claim arrears of pin-money, due from her husband's estate, and other matters connected with the subject, will be found very satisfactorily discussed in the case of *Howard v. Digby*, already alluded to.²⁵

(7.) The paraphernalia of the wife, which includes her wearing-apparel, jewelry, and ornaments, is held, in the American states certainly, exempt from all claim on the part of the executor or creditors of the husband. The English courts seem to have considered that the widow's paraphernalia might, under some circumstances, be liable to the payment of the husband's debts.²⁸ But

²⁸ *Willson v. Pack*, Prec. Ch. 295, 297. The Chancellor here said: "The paraphernalia being only superfluities and ornaments to the wife, was the reason the law subjected them to the husband's debts, rather than that his creditors should starve." But his lordship here considers, that if they were purchased with money belonging to the wife before marriage, or inherited by her during coverture, or saved from a separate allowance, or by way of pin-money, or from her separate earnings, she might hold them against his creditors.

In *Carne v. Brice*, 7 M. & W. 183, it is held that wearing-apparel of the wife, bought with her separate property paid to her by the trustees of the settlement, vests, by law, in the husband, and is liable to be taken in execution on his debts. This seems to be an extreme view of the law of husband and wife, and like some others of that character has contributed to produce some good results, in this country, by the legislature declaring all wearing-apparel exempt from the levy of execution. It is held that family jewels do not belong to the paraphernalia of the widow. But pearl ornaments presented to a married woman by a third party do constitute paraphernalia; so, also, brilliant bracelets, presented to her by the husband, though worn with the family jewels, belong to her paraphernalia. *Jervoise v. Jervoise*, 17 Beav. 566.

In a recent case in Connecticut, *Underhill v. Morgan*, 33 Conn. 105, it was held that an absolute gift of personal property by the husband to the wife, during coverture, is good to vest in her the equitable title, as against all but his creditors; and after the husband's decease the widow may recover the property or its avails against the husband's personal representative, who claimed to hold the same as part of the husband's estate. But in a late case in Massachusetts, *Turner v. Nye*, 7 Allen, 176, where the husband, with the consent of the wife, received the avails of the sale of the wife's real estate, at the time of marriage, and before the recent legislation for the protection of the property of married women, and afterwards executed to her his promissory note for the same, stating the source from which the money came, and that it had been applied to build the husband's dwelling-house; it was held that the wife could not recover the same of her husband's estate after his decease, even in equity, notwithstanding the husband's recognizing it during his life, and when giving money to the wife calling it interest money. This

even the English courts hold that all other property devoted to the payment of debts must first be resorted to ; and if that is not done, the wife will be entitled to indemnity for the loss of her paraphernalia, * out of such property.²⁹ So real estate charged * 175 with the payment of debts must be resorted to, even by the English law, before the paraphernalia.³⁰ And although the husband may, it is said, dispose of the wife's paraphernalia during the coverture, it cannot be taken for the payment of legacies after his decease.³¹ The tendency of the American decisions unquestionably is to adopt a liberal construction in favor of extending the exemptions of wearing-apparel, so as to include articles of jewelry worn for ornament and convenience. But in some cases very nice distinctions have been made.³² By the civil law, it seems that the paraphernalia in all cases go to the wife, to the exclusion of the executor as well as the * creditors * 176

case is somewhat at variance with those already cited from some of the other states, and perhaps explains why the radical legislation for the protection of the property interests of married women was so early resorted to in this state. Most of the legislative reforms in this country, and in England, have been induced, in order to get rid of the rigid construction of the courts in upholding a rule of law, in all its extreme points, which had been adopted in a by-gone age for the security of rights and the redress of wrongs, no longer existing or important if existing. It seems, sometimes, as if the courts were more strenuous, in maintaining an offensive rule of law, in its nicest integrity, than if it had been less objectionable. The very habit of judicial life, in resisting encroachments upon established usages, and the greater necessity of being firm in defence of the feeble and the friendless, seem to beget a kind of enthusiasm in vindication of every rule of law which is universally spoken against and reviled. It must be confessed that such a course of action, on the part of the courts, and thus compelling reform by legislation, is at least an infirmity and a failing in coming up to the highest demands of judicial reform through the formative power of construction ; still it is a weakness leaning to virtue's side, and therefore more readily, perhaps, excused than many others ; and more so, probably, than when courts commit the opposite error, by adopting reformatory constructions in advance of the public sentiment and the demands of the age. We shall not be suspected, we trust, of any affectation of learning in referring to the trite maxim which seems really far more applicable here than in most cases where it is quoted,—in medio tutissimus ibis.

²⁹ *Aldrich v. Cooper*, 8 Vesey, 382.

³⁰ *Boyntun v. Boyntun*, 1 Cox, 106 ; *Northey v. Northey*, 2 Atk. 77.

³¹ *Tipping v. Tipping*, 1 P. Wms. 729 ; *Snelson v. Corbet*, 3 Atk. 369.

³² *Sawyer v. Sawyer*, 28 Vt. 249.

of the husband.³³ And we think this view generally prevails in the American states.

(8.) In Connecticut, the husband's executor seems to be held entitled to take a distributive share of the wife in an estate, even where no decree of distribution is made during the life of the husband.³⁴ But the husband does not, upon the death of the wife, become entitled to any estate secured to her separate use, but it goes to her personal representative.³⁵ The husband, as against himself, his heirs, and his personal representatives, may make a suitable provision for his wife during coverture.³⁶ But where this is claimed, the proof should be very clear, and there should be no question of the aim of the wife being meritorious.³⁷

(9.) The wife having a promissory note against a third person at the time of marriage, and retaining the same until the death of the husband, and the promisor having given a note for the accruing interest payable to her order, and the husband having repeatedly declared that he had no claim for the money, the wife was held entitled to retain both principal and interest against the husband's personal representative.³⁸ And gifts of bank shares to the wife by the husband during coverture, are held valid as against all except his creditors.³⁹

(10.) But it has always been held, that something more is requisite to constitute personalty the separate estate of the wife, than the mere fact that it came to the husband in the right of the wife.⁴⁰ There must be something to impress upon the husband the character of a trustee for the wife, in the holding and management of the property.⁴¹ As it is elsewhere intimated, this may come from the property being originally impressed by the donor with a trust for the separate use of the wife; or it may come from the consent of the husband, evinced by his conduct and declarations, to hold it

³³ 1 Wms. Exrs. 682; Swinb. pt. 6, § 7, pl. 5; Succession of Richardson, 14 La. Ann. 1.

³⁴ Griswold v. Penniman, 2 Conn. 564.

³⁵ Baldwin v. Carter, 17 Conn. 201.

³⁶ Riley v. Riley, 25 Conn. 154.

³⁷ Paschall v. Hall, 5 Jones, Eq. 108.

³⁸ Phelps v. Phelps, 20 Pick. 556.

³⁹ Adams v. Brackett, 5 Met. 280.

⁴⁰ Thomas v. Chicago, 55 Ill. 403.

⁴¹ Crissman v. Crissman, 23 Mich. 217.

⁴² Ante n. 10.

for her sole and separate use;⁴² or it may arise from the husband setting it apart from his own estate, for the sole use of the wife, having no creditors at the time, or retaining ample means to indemnify all such claims.⁴³

(11.) Where the husband of one of the residuary legatees was sole executor of the estate, and wasted more than the share of his wife, it was held that she had no equity to a settlement of her share out of what remained, the husband having presumptively reduced her share into his possession, as husband, before wasting the same.⁴⁴

* SECTION IX.

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THE ESTATE OF THE EXECUTOR OR ADMINISTRATOR IN THE CHOSSES IN ACTION OF THE DECEASED.

1. At common law all actions of contract survive, unless it be account.
2. By the equity of early English statutes, all actions affecting personal property survive.
3. The late statutes in England and in most of the American states provide that remedies for injuries to real estate shall survive.
4. The remedy for personal injuries ceased with the life of the person, until recent statutes.
- n. 5. Similar rule prevails in American states as under English statutes.
5. Some actions of tort for neglect of duty, affecting personal estate, will survive.
- 6, and n. 13. And actions of contract will survive, although no damage accrue to the estate.
7. Cannot, without aid of statute, recover estate conveyed by decedent, in fraud of creditors.

§ 24. 1. THE first inquiry under this head will be what causes of action in favor of the deceased will survive to his personal representative. The rule at common law seems to have been limited to actions of contract, that of account only being excepted, on the ground that it was of a fiduciary nature, and personal to the testator.¹

⁴² *Bridgford v. Riddell*, 55 Ill. 261. In the estate of Page, 31 Leg. Int. 36, it was held that personalty, bequeathed to the wife for her separate use, will descend, as real estate, to her heirs, where the wife deceased before it came into possession.

⁴⁴ *Knight v. Knight*, L. R. 18 Eq. 487, citing *Osborn v. Morgan*, 9 Hare, 432.

¹ *Wheatley v. Lane*, 1 Saund. 216 a, and n. (1); Co. Litt. 89 b.

2. But by the early English statutes,² which have been generally regarded as part of the common law, and as such adopted in the American states, in the practice of the courts, it was provided that actions of replevin and of detinue for the recovery of the goods of the deceased in specie, and some others in the form of actions of tort, as well as actions upon bail-bonds, should survive to the personal representative. It is now well settled, under the equitable construction of these statutes, that all rights of action for the recovery of property, whether real or personal, survive to the personal representative, as well as those of contract. Thus, actions of trespass *de bonis asportatis*, all actions of detinue and trover and of ejectment, survive. And it has been said that, by the equitable construction of these statutes,¹ the executor * 178 or * administrator may have the same action that the deceased himself might have had, for any injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator, so that they may now maintain the actions already named, as well as actions for false returns, for escapes, and other actions of a like kind.³

3. Under the early English statutes of Edw. 3 & 6, there seems to have been no provision for the personal representative to maintain any action for injuries done to the real estate of the decedent during his life. To remedy this evil, the later English statutes⁴ have made provision, and similar statutes exist in most of the American states, by which actions of trespass on the freehold, waste, nuisance, and the like, survive.

4. At common law, and until a very late day, all actions for personal injuries died with the person, so that no actions of assault and battery, false imprisonment, slander, libel, and the like, nor any action for injuries caused to the person by reason of negligence or want of due care, by means of which damage accrued to the person of the deceased, could be maintained by his personal representative. But by a late English statute,⁵ it is provided that

² 1 Edw. 1, St. 1, ch. 3; 4 Edw. 3, ch. 7; 15 Edw. 3, ch. 5; 25 Edw. 3, ch. 5; 31 Edw. 3, ch. 11.

³ *Wheatley v. Lane*, 1 Saund. 216 a, and h. (1).

⁴ 3 & 4 Wm. 4, ch. 42, § 2.

⁵ 9 & 10 Vict. ch. 93, entitled "an act for compensating the families of persons killed by accidents." The American states have, in the main, kept

“whenever the death of any person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the * death may have been caused under such circumstances * 179 as to amount in law to felony.” It is also provided that the action shall be for the benefit of the wife, husband, parent, or child of the deceased, and shall be brought in the name of the executor or administrator. Similar statutes now exist in most of the American states. Many difficult and perplexing questions have arisen in actions under this and similar statutes in the English and American courts, in regard to the mode of estimating damages, which it will not be important to discuss here. We have given attention to the subject elsewhere.⁶

5. There are many actions in the form of tort, or which may be brought in that form, as against an attorney and others employed in their art or profession, for neglect of duty, where the surviving of the cause of action will depend upon the fact of the negligence having produced injury to the estate of the deceased, as where the default was in investigating title to an estate.⁷ The court here

pace, not only with the rules of the common law, but with the advancing qualifications introduced by the English statutes in regard to the survivorship of actions in favor of the personal representative. But causes of action arising from mere torts, such as the default of a postmaster, in his clerks embezzling money from letters, do not survive. *Franklin v. Lowe*, 1 Johns. 396. Upon the death of any person domiciled within the state, his personal representative, appointed by the proper probate court of the state, will succeed to all the rights of personality, both of choses in action and possession, as of the day of the decease. *Bullock's Admr. v. Rogers*, 16 Vt. 294; *Heidenheimer v. Wilson*, 31 Barb. 636; *Beecher v. Buckingham*, 18 Conn. 110.

⁶ *Railways*, 337-341.

⁷ *Knights v. Quarles*, 2 Brod. & Bing. 102. In a recent case, *Bradshaw v. L. & Y. Ry.*, L. R. 10 C. P. 189, it was held, that where one was injured upon a railway and survived the injury, but finally died in consequence of it, his personal representative might recover the damage to the estate before his decease by his inability to attend to business, and the expense of medical attendance; and that might be recovered independently of the late statute. In Massachusetts, an action for fraudulent representations of the defendant, whereby the plaintiff was induced to part with an estate to a worthless per-

intimate an opinion, arguendo, that for an injury by upsetting a coach, whereby the deceased became unable to attend to his business, and thus his property became lessened, that the personal representative may sue in assumpsit and recover. But it has been held, that although the form of action be in assumpsit, no recovery can be had by the personal representative, where the damage consisted entirely in the personal suffering of the deceased, without any injury to his personal estate. Thus it was held, that no action could be maintained by an administrator for a breach of promise of marriage, where no special damage is alleged.⁸ This

* 180 case was * supposed at one time to have established the rule that the personal representative could maintain no action for breach of contract, express or implied, during the life of the decedent, unless the personal estate were thereby diminished; but that rule seems not maintainable upon the more recent cases.

6. Thus it seems now settled, in regard to covenants for title running with the land, that although there may have been a formal breach in the lifetime of the ancestor, yet if the principal injury be to the inheritance, the action will belong to the heir and not to the personal representative.⁹ But it is also well settled that if the ultimate damage is sustained in the lifetime of the ancestor,

son, or for fraudulent acts, whereby a court was induced to set aside a verdict in favor of the plaintiff, if ever maintainable, does not survive to plaintiff, if no damage was done to any particular estate of plaintiff. *Leggate v. Moulton*, 115 Mass. 552.

⁸ *Chamberlain v. Williamson*, 2 M. & S. 408. Lord *Ellenborough*, in giving judgment here, lays down the rule, that the damage to be recovered by an executor or administrator, even if the action be in form, contract, must be such as "operates to the temporal injury of the personal estate" of the deceased, and not an injury solely to his person or feelings. Else, said his lordship, actions accruing out of injuries to the life or health, arising out of the unskillfulness of medical practitioners, the imprisonment of the party brought on by the negligence of the attorney, might be maintained by the personal representative. See also *Stebbins v. Palmer*, 1 Pick. 71, where it is held that an action for breach of promise of marriage does not survive against the administrator of the promisor. The Supreme Court of Maine, in *Hovey v. Page*, 55 Me. 142, held that an action for breach of promise of marriage did not survive, unless special damage were alleged, and that this must be damage to the property of the intestate, and not merely to the person, and such as would of itself be sufficient to found an action upon; and that the promisee was seduced by the promisor by means of such promise, and thereby had a child born out of wedlock, is not sufficient for that purpose.

⁹ *Kingdon v. Nottle*, 1 M. & S. 355; *King v. Jones*, 5 Taunt. 418.

his personal representative may sue upon the covenant.¹⁰ This rule seems fully established by the more recent English cases,¹¹ and that the recovery may be had without averring damage to the personal estate of the deceased. There is no question the personal representative may maintain an action upon a breach of contract, or for a breach of duty, where the cause of action survives, although the deceased stood in the relation of trustee merely.¹² So it has been held, the executor may maintain an action upon notes due the testator and secured by mortgage, although specifically bequeathed.¹³

7. The personal representative has no power to maintain an action, in his representative capacity, to recover property, either real or personal, which the decedent had fraudulently conveyed in order to defeat the rights of creditors; but a conveyance is good against the deceased, and equally so against his personal representative.¹⁴ But in some states this is changed by statute, and an action is allowed solely for the benefit of the creditors.¹⁵

* SECTION X.

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THE RIGHT OF THE EXECUTOR TO PARTICULAR SPECIES OF PROPERTY.

ANNUITIES. CORPORATE STOCKS. PUBLIC STOCKS. APPRENTICES.
COPYRIGHTS. APPORTIONMENT. SURVIVORSHIP.

1. Annuities defined. They are generally regarded as mere personalty.
2. May be specially granted to heirs, or made a charge on realty.
3. Shares in joint-stock corporations now regarded as personalty.

¹⁰ *Kingdon v. Nottle*, 1 M. & S. 355, 365, 366; *Lucy v. Levington*, 2 Lev. 26; s. c. 2 Keb. 831.

¹¹ *Raymond v. Fitch*, 2 Crompt., M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718.

¹² 1 Wms. Exrs. 721; *Hall, Admr. v. Walbridge*, 2 Aikens, Vt. 215, 219.

¹³ *Cryst v. Cryst*, 1 Smith, 370. Damages for flowing land occasioned in the lifetime of the decedent, and for which he had recovered judgment, and the suit was pending on exceptions at the time of his death, will go to the personal representative and not to the heir. *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1.

¹⁴ *Van Wickle v. Calvin*, 23 La. Ann. 205.

¹⁵ *Harrington v. Gage*, 6 Vt. 532.

4. Property in public stocks, state and national, mere personalty.
5. The duty of master and apprentice strictly personal, and does not survive.
6. Literary property, and that in works of art, personal, and goes to executor.
7. Rent due upon a reversion will go, as an incident, to the heir.
8. But rent accruing upon a chattel interest, goes to the executor.
9. Where part of the land leased is freehold and part a chattel interest, the rent will be apportioned to the heir and executor accordingly.
10. Where the demise covers the whole interest, or the rent is severed, it goes to executor.
11. Rent at common law not apportionable upon part of the term.
12. And the same rule holds between tenant for life, and him in remainder.
13. Annuity not apportionable, but accruing interest is.
14. Joint owners of choses in action sue by survivorship, but in trust.
15. The personal representative may sue as trustee for the real owner.
16. Creditor effecting insurance on debtor's life, with his concurrence, held trustee for him.
17. Profits of partnership after death form part of residuary estate.
18. Land damages, assessed for right of way under claim of public right, belong to the heir and not to the personal representative, unless controlled by statute.

§ 25. 1. AN annuity, which is the grant of a sum of money to be paid annually, and which may be for life, for a term of years, or in perpetuity, is generally regarded as mere personalty, and, as such, will pass to the personal representative of the annuitant, where it extends beyond his own life, unless there be some express provision to the contrary.¹

2. But the cases all seem to agree, that if the annuity be specially granted to the annuitant and his heirs, it will go to such heirs, and not to the executor or administrator.² And an annuity, made a special charge or condition of the devise of real estate, will create a legal rent-charge, and to that extent becomes an interest in realty.³

3. Some of the early English cases treated shares in joint-stock incorporated companies as real estate, on account of the profits arising or growing out of the use of the realty; but the settled rule, both in England and America, at present is, that the shares

¹ *Taylor v. Martindale*, 12 Sim. 158; *Turner v. Turner*, Amb. 776; s. c. 1 Br. C. C. 316; *Earl of Stafford v. Buckley*, 2 Ves. Sen. 170; *Lady Holder-ness v. Lord Carmarthen*, 1 Br. C. C. 377. An annuity is payable annually, unless otherwise provided in the instrument of donation, and consequently the first payment becomes due one year from the decease of the testator. *Booth v. Ammerman*, 4 Bradf. Sur. Rep. 129.

² Co. Litt. 20 a, and note; 1 Wms. Exrs. 722.

³ *Ramsay v. Thorngate*, 16 Sim. 575, by Sir L. Shadwell, Vice-Chancellor.

in all corporations, or what is commonly denominated corporate stocks, are mere personalty.⁴

4. Shares, or annuities, in the Bank of England, and all property in the public funds, by express statutes⁵ in England, are declared personal estate; and it is also provided by statute that the same shall not descend to the heir. The same rule extends to all the public, state, and national stocks in America. It was at one time doubted in England, whether, in case of the specific bequest of public stocks, the same vested, as assets, in the executor, so as to require his assent to give effect to the legacy;⁶ but it was finally held, that it did so vest,⁷ and that it should be regarded and treated, in all respects, as pure personalty, and will pass under a bequest as such.⁸

5. It seems to be a settled rule of the English law, that in the ordinary case of apprenticeship, after the death of the master, the executor will have no interest in the apprentice. The early cases are numerous and full to this point, the obligation to instruct being regarded as personal to the master, and as the continuing consideration for the apprentice's duty of service.⁹ There are * statutory regulations by which, in England and some of * 183 the American states, apprentices may be bound to others, under some circumstances, in case of the death of the master.¹⁰

6. The interest in literary property, and that in works of art, or in patent-rights, will, upon the decease of the original proprietor, vest in the personal representative, and he may obtain the renewal of copyright, or of the patent.¹¹

7. In all cases where the owner of a fee, or of an estate in land

⁴ *Buckeridge v. Ingram*, 2 Ves. Jr. 652; *Portmore v. Bunn*, 1 B. & C. 694, 699, 702; *Waltham Bank v. Waltham*, 10 Met. 334; *Redfield on Railways*, 39, 40, and numerous cases cited.

⁵ 1 Geo. 1, § 2, ch. 19; 8 & 9 Vict. ch. 91, § 1.

⁶ *Pearson v. Bank of England*, 2 Br. C. C. 529; s. c. 2 Cox, 175. •

⁷ *Bank of England v. Moffat*, 3 Br. C. C. 260; *Bank of England v. Lunn*, 15 Vesey, 569.

⁸ Lord *Eldon*, in *Ripley v. Waterworth*, 7 Vesey, 425, 440; *Franklin v. Bank of England*, 1 Russ. Ch. Cas. 575, 589.

⁹ *Baxter v. Burfield*, 2 Str. 1266; *Coventry v. Woodhall*, Hob. 134; *Rex v. Peck*, 1 Salk. 66, and cases cited; post, § 39, pl. 38.

¹⁰ 2 N. Y. Rev. Stats. 160, §§ 41, 42.

¹¹ 1 Wms. Exrs. 730; *Wilson v. Rousseau*, 4 How. U. S. 646, where it is held the personal representative may obtain the renewal of a patent for the benefit of an assignee of the deceased patentee.

descendible to the heir, leases the estate for a term extending beyond his own life, but for less than the whole period of the duration of his interest, so that there is a reversion in the estate reserved to himself and his heirs, the rent accruing after the decease of the lessor will go to the heir, as an incident of the reversion, and not to the personal representative.¹²

8. But if the estate leased be of a term of years in the lessor, which was a mere chattel interest, the rent reserved will go to the personal representative, whether there be any reversion of part of the term, or it be all embraced in the lease.¹³

9. But if part of the land leased was held by the lessor in fee, and part for a term of years, so that part of the rent belongs to the heir, and part to the executor or administrator, the rent will be apportioned according to the proportion of each.¹⁴

10. And if the lease cover the entire estate of the lessor, so that there is no reversion, the rent will belong to the personal representative and not to the heir.¹⁵ And where the rent is severed from the reversion by being devised to a third person, it will then go to the executor or administrator of the devisee, in the event of his decease before the term expires.¹⁶

11. At common law, no portion of the rent reserved could be recovered unless the tenant was suffered to enjoy the premises
* 184 for * the full term for which the rent was reserved, there being no apportionment of the rent, unless by the special provision of the demise. So that if tenant for life had underlet for years, the rent being payable on a certain day, and the lessor died the day before the rent became due, or even on the same day, but before the hour of sunset, when rent was demandable, no rent could be recovered for that unexpired term. But by a late English statute the courts are allowed to make an equitable apportionment in such cases.¹⁷

¹² *Sacheverell v. Froggatt*, 2 Saund. 367 a, 367 b, and note, where the early authorities are collected and carefully reviewed.

¹³ *Ibid.* But see contra, *Stinson v. Stinson*, 38 Me. 593.

¹⁴ 1 Wms. Exrs. 731.

¹⁵ *Baker v. Gostling*, 1 Bing. N. C. 19.

¹⁶ 1 Wm. Exrs. 732.

¹⁷ 1 Wms. Exrs. 739, 740; 11 Geo. 2, c. 19, § 15, and the explanatory act, 4 Wm. 4, c. 22. And similar statutes exist in many of the American states. But it was held in New York, that such a statute only applies to leases made by the tenant for life and not to those made by the testator. *Stillwell v.*

12. But always, in these cases, where the lease is binding upon the one entitled in remainder as well as upon him who is seised for life only, the tenant will be compellable to pay rent, for he will be secured in the enjoyment of his full term. But in all such cases, where the lessor who is tenant for life dies before the rent becomes due, it will all go to the remainder-man, although most of it was earned before his estate took effect in possession.¹⁸

13. There is a distinction in regard to apportionment, between an annuity and the accruing interest upon a given sum, which produces the same amount. In the former case, unless the annuitant live till the annuity becomes due, nothing can be recovered by his personal representative, but in the latter case he will be entitled to claim all the interest which had accrued at the time of the decease.¹⁹ And there is an analogous distinction between annuities * and accruing interest, when made the subject of * 185

Doughty, 3 Bradf. Sur. Rep. 359. And where the will provides for the payment of an annuity in quarterly instalments, upon the first days of January, April, July, and October, and to commence immediately after the testator's death, which occurred in the month of August, it was held there could be no apportionment of the first instalment; but that a full quarter should be paid on the first day of October following the death of the testator. *Griswold v. Griswold*, 4 Bradf. Sur. Rep. 216. The rule of the common law against apportionment of annuities has been often recognized in the American states. *Wiggin v. Swett*, 6 Met. 194; *Phelps v. Culver*, 6 Vt. 430. As to the apportionment of rent under the rule stated in the text, see *Mills v. Trumper*, Law Rep. 4 Ch. App. 320; s. c. 17 W. R. 428, where the doctrine of the text is applied under the English statutes, 4 & 5 Wm. 4, c. 22, and 11 Geo. 2, c. 19. This statute has been held not to apply to the mortgagee not in possession. *Paget v. Anglesey*, L. R. 17 Eq. 283. And as between the executor and the devisee of leaseholds and other estates there was no apportionment of rent by the English law till the act of 1870, 33 & 34 Vict. ch. 35, but the devisee took the entire rent next falling due after the death of the testator, although but a single day remained to complete the term. *Capron v. Capron*, L. R. 17 Eq. 288. Where the income of corporate stocks is bequeathed to one for life, and the corpus to another, or to fall into the residue after the life-estate, it was held the dividends were to be apportioned, according to time. *Pollock v. Pollock*, 22 W. R. 724.

¹⁸ *Norris v. Harrison*, 2 Mad. 268; 1 Wms. Exrs. 736, 737.

¹⁹ 1 Story, Eq. Jur. § 480, and cases cited in notes. But where the income of an estate is required to be apportioned from the happening of a contingent event, for the whole year, reckoning from the time when the whole of the income of the preceding year became payable, does not make dividends on stocks apportionable where they had not been declared at the time the event occurred. *Granger v. Bassett*, 98 Mass. 462.

bequests, as to the time the bequest becomes operative. In the case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but where the interest, or net income, of a certain sum is given, it will not begin to run until one year from the decease of the testator, and the first payment, consequently, becomes due in two years from that date.²⁰

14. Choses in action, made payable to copartnerships, or to joint-owners merely, can be sued only in the name of the survivors, on the death of one of the parties to whom made payable.²¹ But in cases of mere partnership, the surviving partner holds in trust for the firm, and after paying all debts due, must account for the share of any remaining surplus to the personal representative of the party entitled.

15. The personal representative may maintain an action upon all choses in action made payable to the decedent, although at the time of his decease he retained no interest in the chose, having parted with the same by sale or gift,²² the executor or administrator suing as trustee for the real owner in such cases.

16. It has recently been held, by Vice-Chancellor *James*, that where one having a large debt against another, with the knowledge of the debtor effects insurance upon his life in a sum beyond the amount of the indebtedness, he must be regarded as doing it for the benefit of the debtor, as well as for his own security. And where the debtor died, and the creditor received the amount of the policy, he was held liable to account on a bill filed by the debtor's personal representative for that purpose, for all moneys in his hands derived from such policies, above his own claims, including the premiums paid.²³

* 186 * 17. And where the articles of partnership provided, that,

²⁰ *Lawrence v. Embree*, 3 Bradf. Sur. Rep. 364. See note 17, ante. A bequest of "the interest or income of two thousand dollars to R. during his natural life" was held to be an annuity and payable at the end of one year from the death of the testator. *Bennett v. Hart*, 30 Legal Int. 132.

²¹ *Martin v. Crompe*, 1 Ld. Raym. 340; s. c. 2 Salk. 444. By this case it seems, tenants in common may either join or sever in an action for rent, and in ejectment they must commonly sever. 1 Chit. Pl. 56. But the rule is otherwise in some of the American states. *Jackson v. Bradt*, 2 Caines, 169; *Hicks v. Rogers*, 4 Cranch, 165.

²² *Brandt v. Heatig*, 2 B. Moore, 184, 185, 186.

²³ *Bruce v. Garden*, 17 W. R. 990.

in the event of the death of one partner, a certain proportion of the profits should be payable to his "widow and family," such profits were held to form part of his residuary estate, subject to the trusts of his will.²⁴

18. It is held in Vermont, that where a highway is laid through the estate of a deceased person, the damages assessed therefor properly belong to the personal representative and not to the heirs, and that payment to such personal representative will bar any claim on the part of the heirs.²⁵ But the decision seems to rest upon the construction of the statutes of that state. We should suppose, upon general principles, that after the descent cast upon the heirs by the decease of the ancestor, any land damages thereafter assessed for laying highways or railways or for other public purposes must belong to the heir, as being in purchase of a right in the realty.

SECTION XI.

RIGHT OF THE PERSONAL REPRESENTATIVE TO CHOSSES IN ACTION AS BETWEEN HUSBAND AND WIFE.

1. The wife's right to her choses in action, accruing both before and after coverture, defined.
2. Rent due upon a demise of her land in their joint names will survive to her.
3. What acts on the part of the husband will defeat the wife's survivorship.
 - (1.) Husband receiving the accruing interest upon her choses in action will not defeat her right of survivorship.
 - (2.) There must be some effective act on his part to defeat her right.
 - (3.) The wife's choses in action include all personal property not in possession. Reduction to husband's possession.
 - (4.) Not sufficient that husband is in possession as executor or trustee.
 - (5.) A decree or award of execution in favor of husband will have that effect.
 - (6.) An award of arbitrators will have the same effect.
 - (7.) An antenuptial contract will give the husband exclusive right to wife's personalty; but a settlement upon the wife, to have that effect, must show such intention. Mr. Roper's statement of the effect of settlements.
 - (8.) A settlement made during coverture cannot transfer the wife's choses in action to husband.
 - (9.) Effect of covenants in aid of settlements.

²⁴ *Re Tibbs' Trusts*, 17 W. R. 304 (M. R.).

²⁵ *St. Albans v. Seymour*, 41 Vt. 579.

(10.) The rights of the wife under antenuptial marriage settlements.

* 187 * 4. If the husband survive the wife, he will take her choses in action as administrator, and will hold them *jure mariti*.

5. Some other cases stated affecting the wife's choses in action.

6. Cases where the husband puts his own choses in action into the wife's control.

7. Wife's equity to settlement attaches to all her estate. Divorce a vinculo cuts off all rights of the husband.

§ 26. 1. WHERE the wife survives, she will be entitled, by right of survivorship, to all her choses in action which the husband had not reduced to possession during the coverture. This is an elementary principle of universal application.¹ And this applies equally to equitable, as well as legal, property or estate.² And there seems to be no distinction in this respect between choses in action which accrued to the wife before, or during, the coverture, except perhaps in regard to the different acts requisite on the part of the husband to defeat the wife's right of survivorship.³ The general doctrine of the wife's right to her choses in action accruing before coverture, until actually reduced to the possession of the husband, as against his assignees in bankruptcy, is largely and learnedly discussed in the Exchequer Chamber, both by court and counsel, in *Sherrington v. Yates*,⁴ where the judgment of the

¹ Co. Litt. 351 a. The same general rule of law, as to the right of the wife to her choses in action, not reduced to possession by the husband during coverture, by her survivorship of her husband, is maintained equally in the American courts as in the English. *Gaters v. Medeley*, 6 M. & W. 423; *Nash v. Nash*, 2 Mad. 133; *Weeks v. Weeks*, 5 Ired. Eq. 111; *Stephens v. Beals*, 4 Ga. 319; *Hall v. McLain*, 11 Humph. 425.

² *Osborn v. Morgan*, 9 Hare, 432, 433.

³ *Dalton v. Midland Counties Railway Co.*, 13 C. B. 474, 478; s. c. 20 Eng. L. & Eq. 273. *Jervis*, Ch. J., here said: "There is a settled rule, that a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her, which, upon the death of her husband, will survive to her, unless he shall have reduced it into possession by doing some act of his own."

⁴ 12 M. & W. 855. The rule of law upon the general question of the wife's right to her choses in action by survivorship has been considerably discussed in the books and cases, and there is not entire agreement in all that has been said upon the point, first and last; but the rule as stated in the text is so well settled, in all the more recent cases of any authority, that we should not feel justified in occupying space in reviewing an apparent conflict in the cases, which has long been set at rest upon both sides of the Atlantic. The subject is considerably discussed in 1 Wms. Exrs. 755 et seq. See also *Scarpellini v. Atcheson*, 7 Q. B. 864. The rules of the common law as to the wife's right to her choses in action by survivorship, prevail in most of the American states.

Court of Exchequer is reversed, and the rule already stated maintained.

* 2. This rule extends not only to chosses in action, strictly * 188 speaking, but to rent due upon a lease of her real estate, in the joint names of the husband and wife, and which the husband might have collected, but did not, during his life.⁵ This, it is said, is upon the ground that as the land, with the accruing rent, survived to the wife, that shall carry all that was in arrear.⁶

3. It may be important to state briefly what acts on the part of the husband will defeat the wife's right by survivorship, although the full discussion of that question belongs more appropriately to a treatise upon the law of husband and wife than to one of this character.

(1.) It was decided by the Queen's Bench, in *Hart v. Stephens*,⁷ where the question is extensively considered, that a promissory note belonging to the wife, and payable to her before marriage, did not become the property of the husband, but passed to her administrator, although the husband had, during his life, received

In Connecticut, however, the rule seems to be established, that as to chosses in action accruing during coverture to the wife, they vest absolutely in the husband, so that without any act on his part reducing the same to possession, they will belong to his personal representative in case of his decease, although the wife survive. *Cornwall v. Hoyt*, 7 Conn. 420; *Burr v. Sherwood*, 3 Bradf. Sur. Rep. 85. In Vermont, it was held, in an early case (*Richardson v. Daggett*, 4 Vt. 336), that the wife's right by survivorship attaches in all cases where she may be joined in the action. In Pennsylvania, the rules of the common law prevail, and the wife's chosses in action will survive to her, unless reduced to possession by the husband during the coverture, whether they accrue before or after marriage. *Lodge v. Hamilton*, 2 S. & R. 491, 493. *Kennedy, J.*, in *Wintercast v. Smith*, 4 Rawle, 177, 182. The husband's assignment in insolvency will bar the wife's right of survivorship. *Shuman v. Reigart*, 7 W. & S. 168. The rule in Vermont is the same as at common law as to the wife's right by survivorship. *Driggs, Admr. v. Abbott*, 27 Vt. 580. But, by statute, the wife's estate goes to her next of kin, instead of the husband, where he survives her. *Heirs of Holmes v. Admrs. of Holmes*, 28 Vt. 765.

⁵ Co. Litt. 351 b.

⁶ *Temple v. Temple*, Cro. Eliz. 791; *Salwey v. Salwey*, Amb. 692.

⁷ 6 Q. B. 937. And it will make no difference that the husband, in addition to receiving the interest, had also received part of the principal. *Nash v. Nash*, 2 Mad. 133. But in general, rents accruing upon the wife's real estate during coverture are the absolute property of the husband. *Shaw, Admr. v. Partridge*, 17 Vt. 626.

* 189 the * interest upon the same, that not being sufficient to vest the exclusive property in the debt in him.

(2.) There must be some decisive and unequivocal act on the part of the husband, not only showing an intention to divest the property of the wife, but which does in fact defeat such property. This may be done by recovering a judgment in his own name, which he may do in regard to choses in action accruing during the coverture,⁸ or by recovering judgment in their joint names, and taking out execution,⁸ or by receiving the money, or obtaining a decree in equity for the payment to him.⁸ So the assignment of the wife's chose in action absolutely, and for a valuable consideration, will defeat her right of survivorship, since that is virtually * receiving the money upon it.⁹ But a mere pledge of

⁸ 1 Wms. Exrs. 765, and cases cited. There must in such case be some act on the part of the husband evincing the purpose and intent of thereby reducing the note, or the money due upon it, to his own possession and appropriating it to his own use. *Allen v. Wilkins*, 3 Allen, 321. The case last cited was that of a promissory note accruing to the wife during coverture, upon a consideration consisting in part of her services, and where the husband during the coverture had done nothing to reduce the same to his own exclusive control, or to manifest an intention to do so. The case showed, by way of inference certainly, that he intended the wife to hold it as her exclusive property. We are not aware that there is any very material distinction as to the right of the husband between the choses in action which accrue to the wife before and those which accrue to her during coverture. In regard to the form of action there is this difference, that the wife must be joined in any suit to enforce her rights of action accruing before coverture, while that is not required in regard to those which accrued during coverture. *Bigelow*, Ch. J., in the case last cited, thus lays down the rule of law in regard to the wife's choses in action accruing during coverture: "In a certain sense, a chose in action which becomes the property of the wife during coverture may be said to be the absolute property of the husband. He has a right to demand and receive the money due upon it, to commence an action upon it in his own name without joining the wife; and if it be negotiable paper, to put it in circulation by his own sole indorsement. In a word, he has the right to do any act to reduce it into his own possession. So long as he and his wife are both living, the entire *jus disponendi* is in him." It was upon this ground, it is here said, that it was held in *Stevens v. Beals*, 10 Cush. 291, that a promissory note given to the wife during coverture became the property of the husband, and her indorsement of it by the consent of the husband was equivalent to his own indorsement and vested an absolute title in the indorsee. But after the death of the wife the husband cannot bring an action upon the choses in action accruing to the wife during the coverture. *Jones v. Richardson*, 5 Met. 247, 249, by *Shaw*, Ch. J.

⁹ *Gibson*, Ch. J., in *Hartman v. Dowdel*, 1 Rawle, 279.

his wife's chose in action, by the husband, as security for his own debts, will not defeat her right of survivorship.¹⁰ So a general assignment by the husband of all his personal estate for the benefit of his creditors will not be held to embrace the wife's choses in action.¹¹ But it seems to have been considered, that where the husband specifically assigned his wife's choses in action in order to procure his own release from imprisonment, this must be regarded as an assignment for value, and as defeating her right of survivorship.¹² So, an assignment expressly in payment of a debt — which is the legal effect of the last case stated — will defeat the wife's right of survivorship.¹³ So, if the husband in any mode, directly or indirectly, receive the money upon his wife's chose in action, or he and his wife, or he alone, authorize another to receive the money, and he does receive it, so that the chose is extinguished, or transferred to another as *bona fide* purchaser for value, the wife's right of survivorship is defeated.¹⁴ And if the husband receive the money due upon a mortgage, the property of his wife, her right by survivorship is defeated, although the estate be not released before the death of the husband, and the wife will hold the title in trust for the mortgagor.¹⁵ So, if the husband release an annuity secured to the wife by bond, it will defeat the wife's right.¹⁶

(3.) It is scarcely necessary to state, that the wife's choses in action include not only notes, bonds, and bills, as well as all other securities for debt, whether they accrue to her before marriage or after, but also all stocks, or shares in joint-stock companies, and all legacies and distributive shares in estates; in short, all personal estate not in actual possession. And so long as any action on the part of the husband remains to be done, in order to bring the avails of such choses in action to the beneficial use of the husband, * the wife's right of survivorship remains.¹⁷ Hence, * 191 if the husband transfer stock into his own name, it will be

¹⁰ *Petrie v. Clark*, 11 S. & R. 377.

¹¹ *Shay v. Sessaman*, 10 Penn. St. 432, 434, by *Gibson*, Ch. J.; *Skinner's Appeal*, 5 Penn. St. 262.

¹² *Gibson*, Ch. J., in *Shay v. Sessaman*, 10 Penn. St. 432, 434.

¹³ *Harrison v. Andrews*, 13 Sim. 595.

¹⁴ *Doswell v. Earle*, 12 Vesey, 473. See also *Hill v. Royce*, 17 Vt. 190; *Schuyler v. Hoyle*, 5 Johns. Ch. 196; 2 Kent, Comm. 136.

¹⁵ *Rees v. Keith*, 11 Sim. 388.

¹⁶ *Hore v. Becher*, 12 Sim. 465.

¹⁷ 1 Wms. Exrs. 767.

treated as defeating the wife's right, but not if he transfer it to his wife's name.¹⁸ But if the husband appropriate the wife's choses in action to make a settlement for her benefit and that of her children, this will be such an extinguishment of her title as to amount to an appropriation to himself, aside from the trust.¹⁹ It is unimportant whether transferring stock into the joint names of husband and wife, by direction of the husband, is regarded as reducing the same to the possession of the husband, or not. For if it is, the very act creates a new estate, which will give the wife the whole by survivorship.²⁰

(4.) The receipt of the wife's choses in action, by the husband, in order to defeat her right of survivorship, must be a receipt in the capacity of husband, and it will not be sufficient for that purpose that he is in possession as executor²¹ or trustee.

(5.) It seems entirely well settled, that any decree of the Court of Chancery, in a suit in the joint names of husband and wife, will not defeat the wife's right by survivorship, short of an order for the payment of the money to the husband, either in express terms, or by awarding execution upon a joint judgment in favor of husband and wife in the name of the husband.²² For the mere institution of the suit, in their joint names, is a sufficient recognition of the wife's right, until some distinctive order in favor of the husband's exclusive right is made.²³

* 192 * (6.) An award of arbitrators in favor of the husband will have the same effect in divesting the wife's right of survivorship as a judgment or decree of court.²⁴

¹⁸ *Wildman v. Wildman*, 9 Vesey, 174; *Ryland v. Smith*, 1 My. & Cr. 53.

¹⁹ *Burnham v. Bennett*, 2 Coll. C. C. 254.

²⁰ *Shuttleworth v. Greaves*, 4 My. & Cr. 35; *Low v. Carter*, 1 Beav. 426.

²¹ *Baker v. Hall*, 12 Vesey, 497; *Wall v. Tomlinson*, 16 Vesey, 413. But in one case, *Ellis v. Baldwin*, 1 W. & S. 253, it was held that where the husband was administrator of an estate, with the will annexed, and had received assets sufficient to pay the legacies, one of which was due his wife, that was sufficient to defeat her right by survivorship, although his administration account had not been settled. See *Knight v. Knight*, 22 W. R. 792.

²² *Anon.*, 2 Vernon, 707; *Bond v. Simmons*, 3 Atk. 20; *Macaulay v. Philips*, 4 Vesey, 15; *Baldwin v. Baldwin*, 5 DeG. & Sm. 319. But an order for the payment of money to the husband, in the right of his wife, does defeat her right of survivorship. *Heygate v. Annesley*, 3 Br. C. C. 362; *Jenkins in re*, 5 Russ. 183.

²³ 1 Wms. Exrs. 771.

²⁴ *Oglander v. Baston*, 1 Vernon, 396.

(7.) An antenuptial contract that the husband shall enjoy the exclusive property in all the wife's personalty, accruing to her as well during the coverture as before, will secure to him the exclusive property in her choses in action, as well as those in possession, and will defeat the wife's right by survivorship, inasmuch as it will be treated as a sale to the husband for value. But a mere antenuptial settlement by the husband upon the wife will not be regarded as having this effect, unless there is some clear expression of that purpose, either express or implied.²⁵ Lord *Eldon*, Chancellor, here stated the true rule upon the question: "According to the modern cases it is established that the settlement for that purpose must either express it to be in consideration of the wife's fortune, or the contents of it altogether must import that, and plainly import it, as much as if it were expressed." The cases upon this point are considerably numerous.²⁶

From the cases just referred to (²⁶) Mr. *Roper*, in his excellent work, makes the following deductions: 1. That a settlement made before marriage, in consideration of the wife's fortune, without saying more, entitles the husband to all her then personal estate, but not to that which accrues to her afterwards. 2. That if a part of her fortune only be stipulated for, the residue of what she then has, and all which afterwards accrues to her, will be exempted. 3. But where it expressly, or by clear implication, appears that the husband was to have the whole of his wife's fortune, present and prospective, he will so hold under the settlement. 4. That as to any portion of the wife's choses in action not included in the settlement, she will have the same right by survivorship as if no settlement had been made.

(8.) It seems to be well settled by the authorities, that no settlement made upon the wife during coverture will deprive her of the right of survivorship, as she is not competent to make any * such binding stipulation at that time, and it could only * 193 be effected by some valid contract to that effect.²⁷

²⁵ *Druce v. Denison*, 6 Vesey, 385.

²⁶ *Heaton v. Hassell*, 4 Vin. Ab. 40; *Adams v. Cole*, Cas. temp. Talb. 168; *Cleland v. Cleland*, Prec. Ch. 63; *Garforth v. Bradley*, 2 Ves. Sen. 675; *Burdon v. Dean*, 2 Ves. Jr. 607; *Elibank v. Montolieu*, 5 Vesey, 737; *Mitford v. Mitford*, 9 Vesey, 87; *Carr v. Taylor*, 10 Vesey, 574.

²⁷ *Lanoy v. Duke and Duchess of Athol*, 2 Atk. 444, 448. This question is extensively considered in *Picquet v. Swan*, 4 Mason, 443. See also *The Fourth*

(9.) Marriage settlements commonly embrace provisions for the issue of the contemplated marriage, as well as for the parents. And covenants or agreements by any of the parties to the settlement to convey future-acquired, or, indeed, any property, to the trustees of the settlement, or in any other form, for the purpose of carrying into effect the provisions of the same, will bind both the parties and property embraced in such covenants or agreements. (*a*) But a contract, by one holding a discretionary power of appointment by will, to exercise the power in favor of one of the objects of it, although only in a ratable proportion, is illegal and void, as being an indirect mode of fettering the freedom of the appointor. (*b*)

(10.) By an antenuptial settlement upon the wife, the husband conveyed certain stocks to trustees for her separate use during life, with the power of disposing of the same by will; and the husband, being a man of abundant means, nevertheless received the dividends upon such stocks, of the trustees, and, after re-investing the same in the name of the trustee for a time, finally transferred them all into his own name, intending to convert them to his own use, and thereupon made his will, confirming the settlement and making ample provision for his wife's support in lieu of all other claims upon his estate. The terms of the settlement made express provision that it should be in lieu of dower and of all claim of the wife, upon the husband's estate. She had never been informed that her husband had transferred the income of the fund to his own use, and supposed it had been kept for her benefit; but nothing was said between the husband and wife in regard to the matter. The wife, being informed of the provision in her husband's will on her behalf, expressed herself satisfied with it. It was held, that the wife had a valid claim upon her husband's estate for all the income of the fund embraced in the settlement, and that the same was not barred by the statute of limitations. (*c*)

4. In the event of the husband surviving the wife, he will be

Eccl. Society v. Mather, 15 Conn. 587, where it was held, that no agreement, made between husband and wife during coverture, would in legal effect transfer, by way of gift or sale, the property in a note or other chose in action. And it seems that the assent of the wife's father, guardian, or trustee, to any such contract or settlement, will not give it any greater force, as against the wife, if she survive the husband. *Stamper v. Barker*, 5 Mad. 157.

(*a*) *Dickinson v. Dillwyn*, L. R. 8 Eq. 546; *Carter v. Carter*, id. 551.

(*b*) *Thacker v. Key*, L. R. 8 Eq. 408.

(*c*) *Boardman's Appeal from Probate*, 40 Conn. 169.

entitled to all her choses in action *jure marito*, and as her administrator, unless when they were secured to her separate use and she had disposed of them in her lifetime or by will.²⁸ And it seems that in regard to personalty, and the avails of it, which is secured to the separate use and appointment of the wife, if she leave the same at her death undisposed of, it will belong to the husband *jure marito*, even before, or independent of administration.²⁹ The American courts hold, also, that the husband, surviving the wife, is entitled to all her choses, as well in action as in possession.³⁰ It has been before stated, that if the husband survive the wife, so that his marital right to her personal estate attaches, by survivorship, and then die before taking administration upon his wife's estate, or after taking administration but before recovering her personal estate, whether in possession or action, administration, either original or *de bonis non*, must be taken upon the wife's estate, but such administrator will, after recovering her personal estate, hold the same, in trust, for the husband's personal representative.³¹

5. In all cases where the husband had actually reduced the wife's choses in action to his own possession before her decease, he should sue in his own name for the recovery of them.³² And in * all other cases he may recover them as her administrator for his own use,³² or in case of a joint judgment he may bring *scire facias* as survivor.³³ Where the wife is entitled, as joint-tenant, to choses in action in reversion, and dies during the continuance of the estate for life, her interest will go to the surviving joint-tenant.³⁴ * 194

6. Questions sometimes arise in regard to choses in action,

²⁸ *Proudley v. Fielder*, 2 My. & K. 57.

²⁹ *Molony v. Kennedy*, 10 Simons, 254.

³⁰ *Stewart v. Stewart*, 7 Johns. Ch. 229; *Clay v. Irvine*, 4 W. & S. 232. But in some of the states it is held that the wife's personal property, upon her decease during the life of her husband, goes to her next of kin, the same as a *feme sole*. *Curry v. Fulkinson*, 14 Ohio, 100; *Dixon v. Dixon*, 18 id. 113; *Holmes v. Holmes*, 28 Vt. 765.

³¹ *Elliot v. Collier*, 3 Atk. 526; s. c. 1 Ves. Sen. 15; 1 Wil. 168; *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381.

³² 1 Wms. Exrs. 780, 781.

³³ *Co. Litt.* 351 b; *Forbes v. Phipps*, 1 Eden, 502; *Hore v. Woulfe*, 2 Ball & B. 424.

³⁴ *Trusts of Barton's Will*, 10 Hare, 12.

belonging to the husband originally, and which it is claimed he has transferred to the wife, by way of furnishing her the means of support, where they live separate by mutual consent. In such cases, the courts incline to treat the property as still remaining in the husband, the wife having only a power to collect the money and apply it for her own support.³⁵ And where others furnish her the means of support, in faith of being reimbursed by means of these securities in her hands, such third persons, after the decease of the wife, acquire no lien for payment out of such securities, either as creditors of the wife or as her personal representatives. Clearly, this could not be the case where the husband has never refused to provide for the payment of such claim, never having been applied to for that purpose. The property in securities transferred to the wife, under such circumstances, still remains in the husband, and he may reclaim them.³⁶

7. The wife's equity to a settlement, during the coverture, attaches to her life-interest and to the income of her property not reduced to possession.³⁷ But a divorce a vinculo cuts off all claims of the husband upon the wife's property.³⁸

³⁵ *Carley v. Green*, 12 Allen, 104.

³⁶ Mr. Justice *Gray*, in *Carley v. Green*, *supra*.

³⁷ *Wilkinson v. Charlesworth*, 10 Beavan, 324.

³⁸ *Wilkinson v. Gibson*, Law Rep. 4 Eq. 162. And after the date of a decree for judicial separation, the wife is entitled, for her sole benefit, to such of her choses in action as are not reduced into possession by the husband before that time. *Johnson v. Lander*, Law Rep. 7 Eq. 228; s. c. 17 W. R. 272.

* CHAPTER VI.

* 195

REMEDIES BY THE EXECUTOR OR ADMINISTRATOR.

SECTION I.

CAUSES OF ACTION ACCRUING TO THE DECEASED, BOTH AT LAW AND IN EQUITY.

1. The personal representative may sue upon all causes of action not strictly personal.
2. In general, he must sue upon causes of action in favor of deceased, as executor, &c.
3. The difficulty of determining this question illustrated by a late English case.
4. Those executors only required to join in the action to whom letters have issued.
5. In causes of action accruing to the estate after the decease, the personal representative may sue, either in his private or representative capacity.
6. But causes of action in favor of the estate cannot be joined with those which are not.
- 7, 8. When proof required. Representative character proved by the original letters, or a duly authenticated copy of the record.
9. Set-offs, existing before the decease, allowed at law, others of equitable cognizance.
10. Upon causes of action accruing to deceased, statute of limitations runs from time of accruing.
11. New promise to the executor, &c., will remove the bar of statute of limitations.
12. Equitable relief pertains to the settlement of estates, but is largely enforced in the probate courts, although not exclusively there.
13. Courts of equity commonly enforce their own final decrees. But in some cases it is more consistent that they act in aid of the probate courts.
14. Courts of equity will enforce discovery of estate, unless the probate courts can do it.
15. The recent English statute enables executors, &c., to remove doubts by resort to courts of equity.
16. One joint executor may sue another in equity, but not at law.
17. Statute of limitations and set-offs allowed in equity upon analogy to law.
18. Courts of equity here will not interfere to control the distribution of assets.
19. When the personal representative may sue.

§ 27. 1. As a general rule it may be said, that the executor or administrator may sue upon every cause of action which existed in favor of the deceased, and which does not perish with the

* 196 person. * This is, indeed, nothing more than the merest truism, since, if the cause of action survives, it must necessarily go to the personal representative. Hence, it would seem, that any extended enumeration of the cases under this head would naturally carry us over the same ground which we have before discussed, under the head of the estate of the executor or administrator in the choses in action of the deceased.¹

2. The principal difficulty, under this head, arises upon the question, whether the action shall be brought by the personal representative, in his personal and private, or in his representative capacity. This question is, in general, answered by determining whether the cause of action accrued in the lifetime of the deceased, or since the decease. And although, in the main, that question is susceptible of a clear and easy solution, that is not always the case, since the cause of action may arise from acts of the testator or intestate, and at the same time not having been perfected during his lifetime, the ultimate right of recovery, the veritable cause of action, may accrue after the decease.

3. This subject is very fairly illustrated by a recent English case.² A special contract was entered into by B. to do the whole of a certain work for G. for a stated sum. Before the completion of the work B. died, and an arrangement was made between G. and C., who afterwards became administrator of B., for the completion of the work, which C. did on his own account. C. brought an action, on the common indebitatus counts, for that portion of the
* 197 work * done by B., alleging that G. was indebted to B. in his

¹ Ante, § 24 et seq. We have before pointed out the remedy, where one or more of joint promisees or obligees decease, but leaving others surviving. Ante, § 25, pl. 14. But where the interest of the deceased in a covenant was entirely several and not joint, although the form of the covenant was joint, the cause of action will survive to the personal representative, notwithstanding there may be other covenantees surviving. *Eccleston v. Clipsham*, 1 Saund. 153, and notes. See also *Sharp v. Conkling*, 16 Vt. 355, 358, where the cases are extensively discussed. The same rule, as to the surviving of causes of action in favor of joint-owners, or joint-tenants, applies in regard to actions ex delicto, as before stated in regard to those ex contractu. 2 Wms. Exrs. 1691.

² *Crosthwaite v. Gardner*, 18 Q. B. 640; s. c. 12 Eng. L. & Eq. 474. The rule in Vermont is, that upon causes of action accruing to the deceased, the personal representative must sue in his representative capacity. *Adams v. Campbell*, 4 Vt. 447. So also in Pennsylvania. *Kline v. Guthart*, 2 Penn. 490-492.

lifetime, but the court held, that as the contract was entire no cause of action accrued during the life of B., the work not being completed; but that the right of recovery for the work done by B. during his life, grew out of the arrangement made subsequent to his death, and that therefore the cause of action was misdescribed.

4. It is said in the English books that if there be more than one executor they must all join in the action, although some of them be within age, or have disclaimed the trust.³ But no such rule of law could be maintained in the American courts, those only being regarded as executors to whom letters testamentary have issued.

5. There are many causes of action which accrue to the personal representative after the decease of the testator or intestate where the action may be brought either in his personal or representative capacity, at his election. The general rule upon the subject is, that in all cases where the judgment when recovered will be assets of the estate, the action may be brought by the executor or administrator, in his representative capacity, but in no others, except where the action is brought in trust for other parties. But there is a numerous class of cases where the action may be brought in the name of the personal representative, without describing himself as such.⁴

³ 2 Wms. Exrs. 1692. In some of the states the English rule is still adhered to. *Hill's Exr. v. Smalley*, 1 Dutcher, 374; *Bodle v. Hulse*, 5 Wend. 313; *Judson v. Gibbons*, id. 224. But that seems to be giving the will a degree of force to which it is scarcely entitled, independent of the probate. Upon the same principle a sole executor, who renounced the trust, where an administrator with the will annexed had been appointed, must still be joined in the suit, which we presume was never claimed. The rule has been changed by statute in New York, and placed on the basis indicated in the text. See also *Moore v. Willett*, 2 Hilton, 522.

⁴ *Manwell v. Briggs*, 17 Vt. 176, and cases there cited. In some recent English cases the point has been considerably discussed, where the executor or administrator may sue in his official capacity. The question arose in a case, where the personal representative continued the business of the deceased, and the court considered, that, unless this was done by direction of the will, for the benefit of the estate, or for some short time, in order to preserve the goodwill of the business for the estate, it must be regarded as a personal affair on the part of the executor, and the suit could not be brought in his representative capacity. *Abbott v. Parfitt*, 19 W. R. 718; s. c. L. R. 6 Q. B. 346. This rule was applied in *Bolinbroke v. Kerr*, 14 W. R. 657; s. c. Law Rep. 1 Ex. 222, where the business of the deceased had been continued for two years, and it was held the avails could not be regarded as assets. But where

6. The plaintiff cannot join, in the same declaration, causes of action which accrued to him in his private capacity, and those which belong exclusively to the estate of a deceased person, and if such misjoinder appear on the face of the pleadings it will be good ground of demurrer, or of error, or motion in arrest of judgment.⁵ But the same declaration may contain counts upon promises to the testator, and upon an account stated with the executor upon

* 198 * the same promises, or concerning any dealings between the estate and the defendant.⁶ Or such counts may be joined with counts for money lent by plaintiff as executor, or money had and received by defendant to the use of plaintiff as executor, or for money paid by the plaintiff as executor, or for goods sold and delivered as executor, or for materials furnished and work done by plaintiff as executor, or upon a bill of exchange indorsed to the plaintiff as executor, or upon a promissory note made to the plaintiff as executor.⁷ But all the causes of action must be alleged to have accrued to the plaintiff as executor or administrator, as the case may be, or it will be regarded as a misjoinder.⁸

7. It was customary at common law for the executor or administrator to make profert in the declaration of his letters testamentary or of administration, and the omission was regarded as ground of special demurrer. But by a late English statute,⁹ that is now dispensed with. And it could never have been of any practical importance, since the executor or administrator is not bound to prove his appointment upon the general issue, unless where he

the business had been continued but two months, it was held otherwise. *Moseley v. Rendell*, 19 W. R. 619; s. c. L. R. 6 Q. B. 338.

⁵ *Coryton v. Lithebye*, 2 Saund. 115, 117 f. But if the money sued for in both counts will be assets, they may be joined, *id.* 117 f.

⁶ 2 Wms. Exrs. 1697.

⁷ *Foxwist v. Tremaine*, 2 Saund. 207 d, 208; *Petrie v. Hannay*, 3 T. R. 659; *Ord v. Fenwick*, 3 East, 104; *Cowell v. Watts*, 6 East, 405; *Dowbiggin v. Harrison*, 9 B. & C. 666, 669, by Lord *Tenterden*, Ch. J.; *Edwards v. Grace*, 2 M. & W. 190; *King v. Thom*, 1 T. R. 487; *Partridge v. Court*, 5 Price, 412; s. c. 7 id. 591; and many other cases in 2 Wms. Exrs. 1698.

⁸ *Webb v. Cowdell*, 14 M. & W. 820; *Henshall v. Roberts*, 5 East, 150; *Lancefield v. Allen*, 1 Bligh, n. s. 592. The rule as stated in the English text-books and reports, in regard to the joinder of causes of action in actions in favor of the personal representative is, that all may be joined when the amount recovered will be assets. 1 Wms. Exrs. 825, 6th Eng. ed.; *Abbott v. Parfitt*, L. R. 6 Q. B. 346; *Moseley v. Rendell*, *id.* 338.

⁹ Common Law Procedure Act of 1852, § 55.

claims title in his representative capacity, thus making the letters one link in the chain of his title,¹⁰ or else where there is a special plea denying the existence of the alleged representative character.¹¹ In all cases where the plaintiff declares, in his representative capacity, upon a cause of action accruing to the testator or intestate, a plea of the general issue, or any other plea, not * denying specially the plaintiff's representative character, is * 199 regarded as admitting it, as set forth in the declaration.¹¹

8. Whenever it becomes necessary to prove that the plaintiff really sustained the representative capacity alleged in his declaration, it must be done by the production in court of the original letters, duly authenticated by the seal of the court from which they issued, or else an authenticated copy from the record of such letters.¹²

9. In actions in behalf of the personal representative, for the recovery of debts due the deceased, the same right of set-off exists as if the action had been brought in the lifetime of the party himself.¹³ But if the action be for the recovery of money, the right to which accrued to the executor or administrator after the decease of the testator or intestate, the right of set-off, as a strictly legal right, cannot be recognized, since the money belonging to the executor or administrator, as such, in his official capacity, and which accrued to him after the decease, becomes thus impressed with a fiduciary character, and must be accounted for under the trust created by the appointment.¹⁴ But where, in consequence of insolvency of some of the parties affected, or other equitable consid-

¹⁰ *Aldis, Exr., v. Burdick*, 8 Vt. 21; *Clapp, Admr., v. Beardsley*, 1 Vt. 151; *Marsfield v. Marsh*, 2 Ld. Ray. 824; *Blainfield v. March*, 7 Mod. 141; s. c. 1 Salk. 285.

¹¹ *Wilbraham v. Snow*, 2 Saund. 47 n, n. (a); 2 Wms. Exrs. 1710, 1711; 2 Greenl. Ev. §§ 339, 340, 341. See also *Brown v. Nourse*, 55 Me. 230, where it is said the question must be raised by plea in abatement. But in general it is considered that it may be raised by any special plea denying the representative character, either in abatement or in bar, but in fact it is generally pleaded in abatement.

¹² *Hamilton v. Aston*, 1 C. & K. 679, by *Rolfe*, B. See also 2 Greenl. Ev. §§ 339, 340.

¹³ 2 Wms. Exrs. 1700.

¹⁴ *Shipman v. Thompson*, Willes, 103; *Lambarde v. Older*, 17 Beav. 542; *Schofield v. Corbett*, 11 Q. B. 779. See also *Dayhuff v. Dayhuff*, 27 Ind. 158.

erations, special equities exist in favor of the set-off, it may sometimes be enforced by resort to a court of equity.¹⁵

10. The effect and application of the statute of limitations is, *ex vi termini*, so exclusively of a statutory character, and so certain to be controlled mainly by the specific provisions upon the subject in each particular state, that it does not seem important to give it much consideration here. It was formerly considered that if the cause of action became perfected, during the life of the decedent, so that the statute of limitations once began to operate, it would not be affected by the decease of the debtor. And the same rule was applied to the case of creditors, since in either case it was

competent for those interested on behalf of the creditor to

* 200 secure * an administration upon the estate of either debtor or creditor, whereby the remedy should become effective.¹⁶ It has sometimes been questioned whether the statute will not be suspended by the decease of the debtor, until the appointment of his personal representative,¹⁷ but there seems no ground for the distinction between debtor and creditor as to the operation of the statute of limitations under the earlier English statutes.¹⁸ But it has been held under these statutes, that where the plaintiff's action abates by death, his personal representative shall have a reasonable time (which in analogy to other provisions of the statute is extended to one year), to bring a new action.¹⁹ And it is conceded on all hands, that where the cause of action sued upon is one first accruing in the time of the personal representative, or after the death of the original party, the statute will only operate from the time of the cause of action accruing, and of there being a party in whose name suit might be brought.²⁰

¹⁵ *Jones v. Mossop*, 3 Hare, 568, where the question of equitable set-off is considerably discussed. *Taylor v. Taylor*, L. R. 20 Eq. 155, where the administrator was allowed to set off a debt due him in his own right from the next of kin against a sum due the next of kin from the administrator on his distributive share.

¹⁶ *Hickman v. Walker*, Willes, 27; *Hodsden v. Harridge*, 2 Saund. 63 k. The same rule applies in New York. *Warren v. Paff*, 4 Bradf. Sur. Rep. 260. The statutory bar is a defence in the Court of Probate, or in a court of equity, the same as in a court of law. *Paff v. Kinney*, 1 Bradf. Sur. Rep. 1.

¹⁷ *Conant v. Hitt*, 12 Vt. 285. ¹⁸ *Hapgood v. Southgate*, 21 Vt. 584.

¹⁹ *Hodsden v. Harridge*, 2 Saund. 63 k, and n. (s), and cases cited. See also *McNeill v. McNeill*, 35 Ala. 30.

²⁰ *Cary v. Stephenson*, 2 Salk. 421; and see ante, n. 16, 19. See also *Murray v. The East India Co.*, 5 B. & Ald. 204.

11. An acknowledgment of the debt from which a new promise to pay it is fairly inferable, will have the same effect, if made to the personal representative, in regard to causes of action accruing to the deceased, as if made during the lifetime of the original party. But care should be had to bring the action in such a form that the new promise may be relied upon, without creating a departure in pleading, which will be the case if the promise in the declaration is alleged as made solely to the testator or intestate.²¹ In order to take advantage of a new promise, made to the personal representative, such new promise should be set forth in the declaration, and the whole question will then arise upon the general issue.²²

* 12. There can be no question that the personal repre- * 201
sentative succeeds to all the equitable rights of the deceased, and that he may resort to all the equitable remedies necessary for the enforcement of his equitable rights. But as courts of probate in the American states, for the most part, it is believed, deal with equitable rights and interests belonging to deceased persons, and administer equitable assets the same as legal, it will not always be requisite to appeal to a court of equity, in order to enforce equitable relief, or relief affecting equitable matters. But, in many particulars, in consequence of courts of probate not possessing all the powers and modes of relief which are exercised in courts of equity, it becomes indispensable for executors and administrators to resort to the latter tribunals. Thus, in all matters affecting the foreclosure of mortgages, specific performance, trust, and the setting aside of deeds and contracts, fraudulently obtained, and in many other cases, where a species of relief is required which cannot be obtained in the courts of probate, it will be indispensable to call in the aid of a court of equity.²³ The most frequent occasion for calling in the aid of a court of equity, in the course of the settlement of estates, arises upon the construction of trusts created

²¹ *Sarell v. Wine*, 3 East, 409.

²² *Timmis v. Platt*, 2 M. & W. 720. The payment of interest to the personal representative will be sufficient to take the case out of the statute. *Clark v. Hooper*, 10 Bing. 480. See post, § 39, pl. 42 et seq. See also *Baxter, Admr., v. Penniman*, 8 Mass. 133; *Johnson v. Beardslee*, 15 Johns. 3; *Martin v. Williams*, 17 id. 330.

²³ *Morse v. Slason*, 13 Vt. 296; *West v. Bank of Rutland*, 19 Vt. 403; *Adams v. Adams*, 22 Vt. 50; *Beach v. Norton*, 9 Conn. 182, 196.

by wills, where there exists doubt as to the true meaning of the instrument, and there are, in consequence, counter-claimants. We have discussed this portion of the subject in another place.²⁴

13. According to the English practice, in all cases where a cause is once brought into a court of equity, that court will retain it, and do complete justice, according to its own views and modes of administration. And this is the more common practice in the American states, as the reported cases in favor of executors and administrators abundantly show. But in some of the states, the courts of equity, when appealed to, act merely in aid of the courts of probate, and having given such relief as their peculiar modes of administration rendered desirable and more efficient, they will remit their decree to the Court of Probate, as the basis of final action in that court. Thus, where in the course of the set-

* 202 tlement * of an estate, a controversy arises between the personal representative and the creditors, whether he should inventory certain property as part of the estate, to which he made claim on his own account, it was held proper for the creditors to contest the question with the administrator, in a court of equity; and the court having decreed against the administrator, and fixed the amount for which he should be held accountable for estate not inventoried and decreed that he should so charge himself in rendering his account, in the probate court, the final adjustment of the matter was left to the probate court.²⁵ Indeed there are many instances where it will be desirable to apply for the aid of a court of equity, that it might seriously embarrass proceedings pending in the probate court, if it were deemed indispensable that the court of equity should render a final decree, in all its remote bearings, so far as the matter before them is concerned.

14. A court of equity, in England, will entertain a bill in favor of the executor or administrator, for the discovery of the personal estate of the deceased.²⁵ But in some of the American states, by special statutory provisions, the same thing may be effected by proceedings in the probate court.²⁶

15. By a recent English statute,²⁷ the jurisdiction of the courts of equity in regard to the settlement of estates has been very con-

²⁴ Ante, Vol. I. 492, 495, and cases cited.

²⁵ Wright v. Bluck, 1 Vernon, 106.

²⁶ Kimball's Exr. v. Kimball, 19 Vt. 579.

²⁷ 13 & 14 Vict. ch. 35, § 19.

siderably extended, thus enabling the personal representatives in all cases, where from uncertainty in regard to the rights of the estate to property, or the relative rights of counter-claimants against the estate, it is impossible to proceed with reasonable security to themselves, to have such doubts removed by a suit for that purpose in a court of equity.

16. Although suits at law cannot be maintained by one or more joint executors against other joint executors, yet in a court of equity one joint executor may sue another.²⁸

17. The statute of limitations, and questions of set-off, will be entertained in defence to suits in equity, upon the analogy of such defences at law, in suits by executors and administrators, the same as in other suits in equity.²⁹

* 18. It is common in England, by means of a friendly * 203 suit in favor of the creditors against the personal representative, to bring the entire matter of marshalling and distributing the assets into a court of equity. But, as no similar equitable jurisdiction exists in this country, all such matters being regarded as more appropriately belonging to the probate courts, we need not further discuss it.

19. The heirs cannot sue upon the breach of covenant against incumbrances accruing in the time of the ancestor. The action must be brought in the name of the personal representative.³⁰ And under the Maine statute, the personal representative is the only party competent to sue upon a policy of insurance on the life of the decedent, even where the money is directed by the statute to be distributed to the widow and next of kin and not to the creditors.³¹ And the personal representative may have an action for the injury to the estate by reason of the default of a railway company in the transportation of the decedent as a passenger; and may recover the expenses of taking care of him, and damages for the injury consequent upon his absence from his business, while he lived, although he died from the effects of the injury. The action will be upon the contract to carry safely.³² And it has been held that the personal representative is the proper party to

²⁸ *Péake v. Ledger*, 8 Hare, 313; post, § 31, pl. 3.

²⁹ 2 Wms. Exrs. 1729, 1730.

³⁰ *Frink v. Bellis*, 33 Ind. 135.

³¹ *Lee v. Chase*, 58 Me. 432.

³² *Bradshaw v. L. & Y. Ry.*, 23 W. R. 310.

sue for withholding property, exempt from execution; and the amount recovered will inure to the benefit of the widow and children.³³

SECTION II.

CAUSES OF ACTION ACCRUING TO THE PERSONAL REPRESENTATIVE.

1. The personal representative may sue upon all causes of action accruing after the decease.
2. He may sue upon contracts, express or implied, arising after the decease.
3. Upon written contracts to the executor as such, he may sue with or without alleging his capacity.
4. One executor presumably acts for the whole. Contract made payable to deceased or bearer.
5. A bond given for debt due estate cannot be sued in representative capacity. Query.
- 6, and n. 14. Actions accrue to executors, &c., when the debt falls due after the decease of the testator, &c.
7. The executor or administrator may have a right of action accruing in remainder.
8. They may also have rights of action accruing from conditions or forfeitures.
9. Debts in favor or against personal representative become merged.
10. There is no mode of trying their validity except in equity or by arbitration in the probate court.
11. The adjustment of a claim against the estate by the personal representative, before his appointment as such, is made effective by his subsequent appointment.
12. In some cases one joint executor may maintain a suit in equity against the other.

§ 28. 1. WE had occasion to consider this matter, incidentally, in the next preceding section. It may now be stated, in general terms, that for any tort or contract affecting the personal estate of a deceased person, accruing after the decease, the personal representative may, ordinarily, have the same remedy to which he would be entitled if the estate were his own, describing himself in his representative capacity, or not, at his election. But, where the judgment, if recovered, will become assets in his hands, it is more common, and, unless there are special reasons to the contrary, more proper, that the representative character of the plain-
 * 204 tiff * should appear upon the face of the proceedings. And it is immaterial whether the personal representative have the actual or only the constructive possession of the estate; or whether

³³ Staggs v. Ferguson, 4 Heisk. 690.

the tort was committed before his appointment or not, since the appointment will always have relation to the time of the decease.¹

2. In regard to matters of contract it seems entirely well settled, by the later cases, that an executor or administrator may maintain an action in his own name, describing himself in his representative capacity or not, at his election, upon all contracts made with himself personally, whether the consideration for such contract proceed from himself as executor, or from the deceased in his lifetime.² So the executor or administrator may maintain an action for money of the estate, received after the decease of the testator or intestate, counting upon the implied promise to himself, on the ground of his legal right to receive the same.³ So, also, if the personal representative is compelled to pay money, on the ground of the decedent having become surety for another, he may maintain an action in his own name, or in his representative capacity, to recover the same.⁴ So, too, where the plaintiff has paid money in his representative capacity, which he ought not to pay, he may recover it in the same capacity,⁵ and equally in his own name, without alleging the capacity. And where work has been begun by the deceased, and completed by his personal representative, it may be recovered in either capacity, it is said,⁶ but care should be taken so to describe the cause of action as to avoid a variance.⁷

¹ *Hollis v. Smith*, 10 East, 293. The case of *Cockerill v. Kynaston*, 4 T. R. 277, where Lord *Kenyon* said the executor or administrator could only maintain an action in his own name for torts affecting the personal estate of the deceased, where he had had the actual possession, is regarded as overruled by *Bollard v. Spencer*, 7 T. R. 358, which is recognized in *Tattersall v. Groote*, 2 B. & P. 253, 256. To the same effect is *Holbrook v. White*, 13 Wendell, 591.

² *Cowell v. Watts*, 6 East, 405; *Thompson v. Stent*, 1 Taunt. 322; *Gallant v. Bouteflower*, 3 Doug. 34; *Webster v. Spencer*, 3 B. & Ald. 360.

³ *Foxwist v. Tremaine*, 2 Saund. 207 d, 208; *Petrie v. Hannay*, 3 T. R. 659; *Smith v. Barrow*, 2 T. R. 476.

⁴ *Ord v. Fenwick*, 3 East, 104, by Lord *Ellenborough*, Ch. J.; ante, § 27, pl. 6, and cases cited in note; *Williams v. Moore*, 9 Pick. 432.

⁵ *Clark v. Hougham*, 2 B. & C. 149.

⁶ *Marshall v. Broadhurst*, 1 Crompt. & J. 403; *Edwards v. Grace*, 2 M. & W. 190; *Aspinall v. Wake*, 10 Bing. 51.

⁷ Ante, § 27, pl. 3, and note; *Werner v. Humphreys*, 2 M. & G. 853, where it was held that for a coat ordered by the defendant, and cut out of deceased's cloth, and tacked together and tried on in his lifetime, but finished and delivered by his administratrix after his death, a recovery could not be had for

* 205 * 3. And, it seems, that upon notes and bills given to the personal representative, as such, for debts due the estate, he may sue in his representative capacity, or he may sue in his own name, treating his representative capacity alleged in the contract as a mere *descriptio personæ*.⁸ So in cases where the executor or administrator may sue in his representative capacity, the administrator *de bonis non* may maintain an action,⁹ although there are some early cases to the contrary.

4. It has been held, that an executor may sue upon a promissory note, as bearer, the same being given for a debt due the estate, although made payable to the deceased, or bearer, and not delivered until after the death of the testator.¹⁰ And it has also been held, that an administrator may sue in debt upon a judgment recovered in his representative capacity in another state.¹¹ And where there are more than one joint executor or administrator, all may, in general, join in an action upon an implied contract, where the business was transacted with any number less than the whole, * it being presumed that those acting did so on behalf of the whole number.¹²

the price, as for goods sold and delivered by the intestate, the proper form of action being for goods sold and delivered by the administratrix.

⁸ *King v. Thom*, 1 T. R. 487; *Partridge v. Court*, 5 Price, 412; s. c. 7 id. 591. See also *Trotter v. White*, 10 Sm. & M. 607.

⁹ *Catherwood v. Chabaud*, 1 B. & C. 150.

¹⁰ *Baxter v. Buck*, 10 Vt. 548.

¹¹ *Talmage v. Chapel*, 16 Mass. 71; *Macnichol v. Macnichol*, L. R. 19 Eq. 81; *Biddle v. Wilkins*, 1 Pet. U. S. 686; *Young v. O'Neal*, 3 Sneed, 55; *Slauter v. Chenoweth*, 7 Ind. 211. This must be upon the ground that a judgment in favor of the personal representative creates an indebtedness to the person in his private as well as in his representative capacity, which seems to be the settled rule upon the point, as well in England as America. 1 Wms. Exrs. 791; *Crawford v. Whittall*, 1 Doug. 4, n. 1; *Bonafous v. Walker*, 2 T. R. 126. The same rule applies to all written contracts for a debt due the estate, but in the name of the executor or administrator. *Catlin v. Underhill*, 4 McLean, 337; *Lyon v. Marshall*, 11 Barb. 241. But in all these cases, as has been decided an infinite number of times, where the judgment will be assets, the plaintiff may describe himself as executor or administrator, and join counts upon claims in favor of the estate accruing in the lifetime of the decedent. *Heron v. Hoffner*, 3 Rawle, 393; *McDonald v. Williams*, 16 Ark. 36; *Flower v. Garr*, 20 Wendell, 668. In some of the states executors and administrators, by special statute, are allowed to sue by virtue of appointments made in other states. *Price v. Morris*, 5 McLean, 4.

¹² *Heath v. Chilton*, 12 M. & W. 632.

5. But it has been held, that where an executor or administrator accepts a bond from a simple contract debtor in lieu of such simple contract debt, although expressed to be given him in his representative capacity, he cannot maintain an action upon it, as such, on account of the debt due the estate being merged in the higher security, and thus extinguished.¹⁸ But it seems to us that the distinction rests upon no very satisfactory grounds, and that there is no substantial reason why the executor or administrator may not as well sue upon a specialty, in his representative capacity, which is really assets, as upon a simple contract. The attempt to maintain any such distinction will be likely to prove so unsatisfactory in practice as in the end to be abandoned. The law has already had quite enough to answer for, by reason of its incomprehensible distinctions and refinements. We had supposed that all practical difference between specialties and simple contracts had quite disappeared; and with the difference, it would seem wise to abandon the distinctions, as far as practicable. There is quite sufficient of real difficulty in the administration of the law to employ the time and exhaust the strength of the profession and the courts, without overpowering their energies and confusing their minds, upon merely speculative points. Hard work, to sharpen one's wits, is well enough as matter of mere discipline, with those who have no other more legitimate modes of accomplishing the end; but it seems especially out of place, in a study or an art, where, with all the force at command, there is constant necessity of overwork, and, what is worse, perhaps, of leaving necessary work half done. (a)

6. It seems scarcely necessary to state that there will arise many cases where the meritorious cause of action really accrues in the lifetime of the deceased, that the same was not fully matured until after the decease. One very familiar illustration under this head will occur to all, of debts created in favor of the testator or intestate, in his lifetime, but which did not fall due till after his

¹⁸ *Hosier v. Lord Arundell*, 3 B. & P. 7; *Partridge v. Court*, 5 Price, 412, 419, 420, 421; *Price v. Moulton*, 10 C. B. 561.

(a) The case of *Treat's Appeal from probate*, 40 Conn. 288, adopts the very sensible rule, in regard to probate proceedings, that where by fair and reasonable intendment the necessary averment can be substantially found, the pleading will be held sufficient, and the strict rules of pleading not be applied.

decease, debitum in presenti, solvendum in futuro. In such cases,* it is not material that the contract should name executors or administrators, as the right of action will survive to them without being specially named in the contract. And where the contract specially names assignees, it will not affect the right of the personal representative, who is the legal assignee.¹⁴

7. So the executor or administrator may have a right of action, on behalf of the estate in remainder, as where a lease is made to B. for life, remainder to his executor or administrator;¹⁵ or where a lease for years is bequeathed to A. for life, remainder to B., who dies before A. Although B. never had the term in him, yet it shall devolve upon his personal representative.¹⁶

8. So a right of action may accrue to the executor by reason of the non-performance of conditions in bequests to be performed by the legatee or devisee under the will. And so also where the condition in the will is, that the executor shall pay money or do some other act in order to defeat some grant made by the testator in his lifetime, as pawning or mortgaging his estate. The performance of such condition will create a new cause of action in the executor.¹⁷

So an estate may accrue by way of forfeiture, by reason of the non-performance of conditions by others,* and it may first

¹⁴ *Chapman v. Dalton*, Plowd. 284, 286, 288. But if the promise be to pay to such person as the decedent shall appoint by will, and there be no appointment, the executor cannot sue, for here there is no promise to pay the deceased, but only to his appointee, and in such cases there must be such an appointee. *Pease v. Mead*, Hob. 9 b, 10; *Goodall's Case*, 5 Co. 95 b, 96, 97 a. "The law will never seek out an assignee in law, when there may be an assignee in fact."

¹⁵ Co. Litt. 54 b.

¹⁶ 1 Wms. Exrs. 793. And in regard to all vested interests in personalty, in remainder, where the remainder does not vest in possession during the life of the party entitled in remainder, it will accrue to his personal representative, and he may enforce it for the benefit of the estate. *Pinbury v. Elkin*, 1 P. Wms. 563. And so, although the estate in remainder do not absolutely vest, being dependent upon a condition which may never happen, yet if it be of such a nature as to be transmissible, and first accrue in possession after the decease of the party entitled, it may be enforced by the executor or administrator; as in the case of *King v. Withers*, Prec. Ch. 348, where the testator charged a legacy upon estate devised to his son, for the benefit of his daughter, provided the son should die without issue male, and the daughter predeceased the son, who died ultimately without issue male, it was decreed that the husband of the daughter, being her administrator, should take the legacy.

¹⁷ 1 Wms. Exrs. 794.

accrue after the decease of the party entitled, and thus fall to the personal representative of such party.¹⁸

9. It is a familiar rule of law, that the debts, both in favor and against the estate of a deceased person, as well in favor as against the personal representative, are extinguished by the appointment of such person to be the personal representative of the deceased, since he could neither sue nor be sued by himself.¹⁹ And the debt is not revived, as between the personal representative and the estate, by the resignation or removal of such person from that office, and the appointment of another in his place.²⁰ His only legal remedy, for a debt in his own favor in such case, is in the settlement of his account before the probate court.²⁰

10. But where the personal representative of an estate has disputable claims against the estate, or the estate against him, a court of equity will entertain jurisdiction for the purpose of determining the questions in controversy,²¹ on the ground that there is no established and adequate mode of trying such questions in any other court. But by statute in some of the states, and perhaps on general principles, the probate courts might refer such claims to arbitration in their discretion.²²

11. Where the widow assumes to adjust claims against the estate of her deceased husband, before her appointment as administrator, her subsequent appointment will have such relation to the decease of the intestate as to give her acts the same effect precisely as if done subsequent to her appointment. And where the adjustment of all the claims and counter-claims in such a case was found on re-examination to correspond with the precise sum due, with only a trifling variation, it was held binding upon the parties.²³

12. It has been held that one of two joint executors may

¹⁸ *Chauncy v. Graydon*, 2 Atk. 616; *Peck v. Parrot*, 1 Ves. Sen. 236; *Barnes v. Allen*, 1 Br. C. C. 181; *Perry v. Woods*, 3 Vesey, 204; *Massey v. Hudson*, 2 Mer. 130. An appointment cannot be made to the personal representative of the party named in the power. *Maddison v. Andrew*, 1 Ves. Sen. 57, 59. See also *Munroe v. Holmes*, 9 Allen, 244.

¹⁹ 2 Wms. Exrs. 937; *Fryer v. Gildridge*, Hob. 10; *Wankford v. Wankford*, 1 Salk. 299, 303, 305.

²⁰ *Prentice v. Dehon*, 10 Allen, 353.

²¹ *Adams v. Adams*, 22 Vt. 50.

²² *Bachelor v. Hanson*, 2 Aikens, 319.

²³ *Alvord v. Marsh*, 12 Allen, 603.

* 209 maintain * a suit in equity against the other to revive a suit against him for the foreclosure of a mortgage commenced by the testator in his lifetime.²⁴ And it has also been held, that, in the case of two joint executors, one may maintain a bill in equity against the other for an account, without making the creditors, legatees, or next of kin parties.²⁵

SECTION III.

REVIVING SUITS BY EXECUTOR OR ADMINISTRATOR.

1. At common law all suits abated by the death of any party.

u. 1. By the English statutes, such as survive may be revived and proceed, either in the name of surviving parties, or of representatives.

2. Judgments may be entered, *nunc pro tunc*, so as to avoid the effect of the death of the parties, in some cases.

3. Where plaintiff dies after obtaining judgment, it must be revived.

4. Parties representing interest damnified may bring writ of error.

5. Death of party revokes power of arbitration.

6. Proceedings in regard to claims against estates of deceased person, how regulated by statute in the different states.

§ 29. 1. THIS topic, with others in this chapter, belongs more appropriately to a treatise upon practice, than to one upon the settlement of estates. We could not, therefore, be expected here to refer to the numerous decisions upon the English statutes affecting questions of abatement and revivor of actions. It seems to have been considered, at common law, that the death of any party, whether plaintiff or defendant, and whether a joint or sole party, would abate the action. And where the cause of action survived, either to joint parties or to personal representatives, such persons as possessed the right could institute a new action.¹

²⁴ *McGregor v. McGregor*, 35 N. Y. 218.

²⁵ *Wood v. Brown*, 34 N. Y. 337.

¹ 1 Chit. Pl. 58, 59. But now, by statute 8 & 9 Wm. 3, ch. 11, § 7, where the cause of action survives in favor or against the surviving parties, the suit does not abate, but the death being suggested upon the record, it proceeds in the name of the survivors. And by statute 15 & 16 Vict. ch. 76, § 135 (Common-Law Procedure Act, 1852), where a sole plaintiff or defendant deceases during the pendency of the action, the suit proceeds in the name of the per-

* 2. But by the practice of the English courts, from an early day,² judgments were accustomed to be entered *nunc pro tunc*, where the parties had deceased, after verdict, or pending a motion for a new trial, or upon writ of error or exceptions, or after argument in *banc* upon an *advisare vult curia*, and in many other cases, where the delay might in any sense be attributable to the laches of the court. In this mode the judgment being entered, as if occurring while the parties were in life, the record showed a valid judgment, and as this imported absolute verity, no issue could be raised against it.

3. But where the plaintiff dies after obtaining judgment, and before execution, the personal representative must revive the judgment.³ And by an early English statute,⁴ which has been pretty generally adopted into the practice of the American states, either by construction or statute, the administrator *de bonis non* was regarded so far in privity with the former executor or administrator, that he might sue out an execution, by reviving a judgment obtained by them. And the same rule obtains in regard to decrees in equity, under the equity of the statute.⁵ But where the plaintiff dies after the defendant is charged in execution, the personal representative is not obliged to revive the judgment.⁶ And the efficacy of an execution will not cease on account of the death of the judgment creditor, and may be executed thereafter.⁷ And where one or more of several plaintiffs die within a year and a day after judgment, execution may be had by the survivors in the name of the whole, so as to have the execution correspond with the judgment, without any proceedings to revive the same.⁸

sonal representative, where the cause of action survives. See also *Underhill v. Devereux*, 2 Saund. 71, and notes. An action may be revived where any of the causes of action survive, although that is not the case with every count in the declaration. *Booth v. Northrop*, 27 Conn. 325.

² Stat. 17 Car. 2, ch. 8, § 1. The same practice generally obtains in the American states. *Stickney v. Davis*, 17 Pick. 169; *Gunn v. Howell*, 35 Ala. 144.

³ 1 Wms. Exrs. 806.

⁴ 17 Car. 2, ch. 8, § 2. See also *Clerk v. Withers*, 2 Ld. Raym. 1072, 1076.

⁵ *Owen v. Curzon*, 2 Vern. 237.

⁶ 1 Wms. Exrs. 808, 809; *Taylor v. Burgess*, 16 M. & W. 781.

⁷ *Ellis v. Griffith*, 16 M. & W. 106; *Clerk v. Withers*, 2 Ld. Raym. 1072.

⁸ *Tidd*, 9th ed. 1120.

* 211 * 4. In general, the party representing the interest which is damnified by a judgment, if erroneous, may bring a writ of error, certiorari, or other proper proceeding, to revise the same. Hence, in actions affecting the realty, this right commonly devolves upon the heir, but in personal actions, upon the personal representative.⁹

5. The authority of an arbitrator is determined by the death of either party, before award.¹⁰ But it seems to be considered that the death of one of the parties, on one side, the cause of action surviving to others, will not destroy the power of the arbitrator.¹¹ But it is now common in practice to insert in the rule of submission, that the award may be delivered to the personal representative, in case of the death of either party.¹²

6. It may be proper to state here, that in most of the states, there is more or less restriction upon the right of the creditors of an estate, in regard to instituting suits against the personal representative of the deceased, until after the lapse of a certain period, and giving notice of the existence of the claim. And in many of the states it is required, that in the settlement of all estates represented insolvent, and that, in practice, will commonly include a large proportion of the whole, the probate courts shall appoint commissioners to receive and adjust all claims against the estate, and to report the same to that court whose allowance is final unless appealed from. In such cases, no action can be brought, except by presenting the claim before commissioners, and if not presented within the time limited by the court, they become effectually barred, not only the remedy but the claim being thereby effectually extinguished.¹³ In some of the American states this mode of adjust-

* 212 ing the claims against the estates of deceased persons * has

⁹ 1 Wms. Exrs. 810-815.

¹⁰ *Potts v. Ward*, 1 Marshall, 366; *Cooper v. Johnson*, 2 B. & Ald. 394; *Rhodes v. Haigh*, 2 B. & C. 345.

¹¹ *Tindal*, Ch. J., *In re Hare*, 6 Bing. N. C. 158, 163.

¹² *Tyler v. Jones*, 3 B. & C. 144. And the death of one of the parties, after a reference by rule of court, will not operate as a revocation of the power of the referees, where the cause of action survives. *Bacon v. Crandon*, 15 Pick. 79. But in the case of a submission to arbitration merely, the death of either party will annul the power of the arbitrators, unless saved by an express stipulation to that effect. *Bailey v. Stewart*, 3 W. & S. 560.

¹³ *Hunt v. Fay*, 7 Vt. 170.

been found so convenient that it has been extended, by express statute, to all estates, as well solvent as insolvent.¹⁴

¹⁴ Gen. Stats. Vt. ch. 53, § 1. In many of the American states the personal representative of a deceased plaintiff is allowed to enter an appearance upon motion and the suggestion of the death, in all cases where the cause of action survives. And where the appearance is not thus entered voluntarily, the defendant may cite such personal representative to appear and prosecute the action, under pain of relinquishing the cause of action. *Tyler v. Whitney*, 8 Vt. 26.

THE INVENTORY OF THE ESTATE.

1. From the earliest times an inventory of the estate has been required.
2. In the American states the inventory of all the estate is imperative.
- n. 3. This inventory of the estate has grown into disuse in England.
- n. 5. The character of the inventory required.
3. The party at whose suit an inventory and account is claimed, must have valid legal claim against the estate.
4. The inventory must embrace all the estate, real and personal, including choses in action.
5. The omission to return an inventory rather ground of presumption than of giving damages.
6. The property fraudulently conveyed by the deceased may be inventoried.
7. How far money, the separate estate of the wife, should be inventoried.
8. What choses in action to be inventoried, and how.
9. Inventory cannot be corrected except by the oath of the executor, &c.
- 10, and n. 20. The English and American mode of returning inventories contrasted.
11. Personal effects held in trust, except money, not to be inventoried.
12. Liable on bond for omission to make additional inventory.

§ 30. 1. IN the English ecclesiastical courts, from the date of the earlier statutes,¹ it has been required of executors and administrators to furnish an inventory of the personal assets belonging to the estate, and which have come to their hands to be deposited in the office of the register of the court, and which may form the basis of the ultimate account in such cases. And the bond required of an administrator by statute,² at an early day, was conditioned, among other things, for his exhibiting into the registry, on or before a day named, "a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession."³

¹ 21 Hen. 8, ch. 5, § 4. Inventory required at an earlier date. 4 Burn's Eccl. Law, 236.

² 22 & 23 Car. 2, ch. 10, § 1.

³ But it seems, in the practice of the English ecclesiastical courts, in modern times certainly, no inventory has been presented, unless where the executor or administrator is specially cited, by some party having a legal interest in the estate, to produce such inventory and render an account of his administration. 1 Wms. Exrs. 878. But in the English Court of Probate the inventory seems now to be required, and the practice is to attach the administrator or executor

* 2. These early English statutes have formed the basis * 214 of the same, or similar, requirements in most of the American states; and, as far as we know, this requirement of the law is strictly enforced in practice with us. It was, indeed, not formally required, in all the early statutory provisions⁴ for the settlement of estates; but at present the personal representative is generally required to inventory the entire estate of the deceased, both real and personal, since all is charged with the payment of debts, and it cannot be known, in the first instance, that it will not all be required for that purpose.⁵

3. It seems to be settled in the English practice, and the same rule will obtain in the American states, that in order to justify a citation against the personal representative, to produce an inventory and render an account of his administration, the party at whose suit the same issues must be a creditor, legatee, distributee, or some party having a vested legal interest in the estate.⁶

for not filing one, and after being so in contempt he is not entitled to his discharge upon filing the required inventory, except upon the payment of costs. *Marshman v. Brookes*, 32 Law J. N. S. Prob. 95. But this is done under the power given the Court of Probate, under 20 & 21 Vict. ch. 77. But it was said, recently, that a person who had become surety in an administration bond might, under special circumstances, obtain the aid of the court to compel the administrator to bring in an inventory and account. *Overman in re*, 8 Jur. N. S. 572. The case here referred to by the learned judge is *Roberts v. Roberts*, 2 Cas. temp. Lee, 399, where it was held that the court will, ex officio, order an inventory, where the interest of minors is concerned. See *Bouverie v. Maxwell*, 1 P. & D. 272.

* Previous to Stat. 1816, in Massachusetts, an administrator was not required to inventory real estate. 1 Mass. 35, 204.

⁵ Mass. Gen. Stat. ch. 94, § 2. But there are in most of the states either general or special grounds of excusing the return of an inventory. Thus, if no property comes into the hands of the executor or administrator, he cannot return any inventory, and is not required to render any account. *Walker v. Hall*, 1 Pick. 20. And when the executor, who is the residuary legatee, gives a bond to pay the debts and legacies, he is thereby excused from returning an inventory. *Stebbins v. Smith*, 4 Pick. 97; *Jones v. Richardson*, 5 Met. 247; *Colwell v. Alger*, 5 Gray, 67. And the administrator, by returning an inventory of all the estate come to his hands, in the first instance, will have complied sufficiently with the requirements of the statute, and if property subsequently comes to his hands it will be sufficient to render his account of it, upon his final account of administration. *Hooker v. Bancroft*, 4 Pick. 50; Gen. Stats. of Mass. ch. 98, § 7.

⁶ 1 Wms. Exrs. 879-881. And in some of the cases it is held that a probable contingent interest will justify calling for an inventory. But if one swear

* 215 * 4. The inventory must embrace all the estate, both real and personal, which comes to the possession of the executor or administrator. And according to the English practice, which is common, if not universal, in the American states, the choses in action belonging to the estate are designated upon the inventory as collectible or not collectible, or, as it was formerly expressed, "separate and desperate."⁷ But it has been decided that the executor or administrator is not bound, in the first instance, to inventory the real estate,⁸ since, *primâ facie*, he has no interest in it, and no right to possession of the same, unless in case of the deficiency of the personalty to meet debts and legacies, with the expenses of administration.

5. The omission to return an inventory according to the requirements of the statute, may justify a more unfavorable construction of the testimony brought against the executor or administrator, with a view to charge him on his final account, but will not of itself be sufficient to charge him with the payment of the debts.⁹ And in some of the states it has been held, that damages may be assessed for the failure to return an inventory;¹⁰ but

positively to a claim against an estate, it has been held sufficient to entitle him to an order for an inventory and an account. *Forsyth v. Burr*, 37 Barb. 540.

⁷ 1 Wms. Exrs. 883; *Toller*, 248. The administrator *de bonis non* must return an inventory, the same as any other. *Wilson v. Keeler*, 2 Chip. 16.

⁸ *Henshaw v. Blood*, 1 Mass. 35; *Prescott v. Tarbell*, *id.* 204. Under the statute and practice in New York, the executor is required to inventory assets belonging to the estate which are situate in another state. *Estate of Butler*, 38 N. Y. 397. But this must be regarded as altogether exceptional, unless and until it comes to the possession or control of the executor. But in the case last cited much of the property in question consisted of choses in action, the debtors residing in other states. In that class of property there is no doubt the general administrator of the domicile of the decedent has the proper custody of the securities, and may receive payment and discharge the debtors, unless there are creditors in the place of the domicile of the debtors. *Ante*, § 2, pl. 15, 16.

⁹ *Leeke's Admr. v. Beanes*, 2 Har. & J. 373; *Moses v. Moses*, 50 Ga. 9. The omission to return an inventory is said to be a strong circumstance to support the charge of misconduct. *Hart v. Ten Eyck*, 2 Johns. Ch. 62. The interest of a deceased partner in the partnership can only be inventoried as an unascertained balance. *Thomson v. Thomson*, 1 Bradf. Sur. Rep. 24.

¹⁰ *Scott v. The Governor*, 1 Missouri, 686. The omission to inventory a balance due the estate from a savings bank, if known to the administrator, has been held a breach of his official bond; and he cannot heal the breach by showing that he acted in good faith upon the advice of counsel. *Bourne v. Stevenson*, 58 Me. 499.

unless some specific damage was caused thereby, it does not occur to us that any rule of damages could well be devised in regard to such an omission.

* 6. The decisions in regard to the duty of the executor or administrator in returning an inventory, will be the same, which is to fix his accountability before the probate court, at least so far as the personal property belonging to the estate is concerned. But it may aid in giving a general view as to the extent of that obligation, if we state briefly a few points which have been ruled in different cases. It was held in Connecticut, at an early day, that an executor or administrator should inventory property fraudulently conveyed by the deceased, as against creditors, and that the personal representative so far represents the interests of the creditors, that he may take possession of estate so circumstanced, and retain the possession of the same, as against the fraudulent grantee, until it can be known if it will be required for the payment of debts.¹¹ * 216

7. And it has been decided, that the money in the hands of the wife of the deceased, at the time of the decease, although earned by her before marriage, or given to her by her husband, must be inventoried and accounted for as the estate of the husband.¹² But the more recent decisions would give property, so situated, to the wife, where it was not required for the payment of debts, and would justify the Court of Probate, in settling the final account of the executor or administrator, to give permission to credit himself with the amount, as paid to her. This is upon the supposition that the property or money had been kept separate from the husband's estate, as the separate property of the wife.¹³

8. It is regarded as the duty of the personal representative of a deceased person to inventory property deposited in the hands of a third party, for custody merely ;¹⁴ and also demands assigned to secure the payment of debts.¹⁵ Debts inventoried without comment will be presumed collectible, and the party charged with the

¹¹ *Minor v. Mead*, 3 Conn. 289; *Booth v. Patrick*, 8 Conn. 106; *Andruss v. Doolittle*, 11 Conn. 283. But see *Martin v. Martin*, 1 Vt. 91; *Peaslee v. Barney*, 1 Chip. 331; *Moody v. Fry*, 3 Humph. 567.

¹² *Washburn v. Hale*, 10 Pick. 429.

¹³ *Richardson v. Merrill*, 32 Vt. 27; ante, § 23, pl. c.

¹⁴ *Potter v. Titcomb*, 1 Fairf. 53.

¹⁵ *Williams v. Morehouse*, 9 Conn. 470.

amount, unless upon proof of loss without fault.¹⁶ But if they be inventoried as desperate or doubtful, perhaps the administrator * will not be charged with the amount, except upon proof that he did or might have collected them.¹⁷ The inventory so far as regards choses in action, is not regarded as of much importance, since it can afford nothing more than an approximation towards the truth of the ultimate availability of such securities.¹⁸

9. In the English courts it has often been decided, that the probate court has no power to correct an inventory, by other proof than the disclosure of the executor or administrator upon oath, but will accept the inventory presented as corrected by such disclosure. And if other proof is to be adduced, will hear that upon the final accounting.¹⁹

10. It seems to be the practice in the English courts, for the executor or administrator to return the inventory of the estate, mainly upon his own responsibility; and the prices affixed to the different items is to be gathered from the estimate of such persons as he may choose to consult.²⁰ But in the American prac-

¹⁶ *Graham v. Davidson*, 2 Dev. & Batt. Ch. 155.

¹⁷ *Finch v. Ragland*, 2 Dev. Ch. 137. ¹⁸ *Adams v. Adams*, 22 Vt. 50.

¹⁹ *Hinton v. Parker*, 8 Mod. 168; *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 Ad. & Ell. 623. As to the practice of the ecclesiastical courts in amending inventories, see *Shackleton v. Barrymore*, cited in *Telford v. Morison*, 2 Add. 329; *Butler v. Butler*, 2 Phillim. 37; *Barclay v. Marshall*, id. 188; *Hunter v. Byrn*, 2 Add. 311; *Brogden v. Brown*, id. 336; *Watson v. Milward*, 2 Cas. temp. Lee, 332.

²⁰ Burn's Ecclesiastical Law devotes thirty pages to this topic. It is there said (vol. 4, p. 250), "That by the constitution of the law, the inventory shall be made in the presence of some credible persons, who shall competently understand the value of the deceased's goods, for it is not sufficient to make an inventory unless the goods therein contained be particularly valued and appraised, by some honest and skilful persons, to be the just value thereof in their judgments and consciences; that is to say, at such price as the same may be sold for at that time." Swinb. 425, 426; post, § 39, pl. 50. But even under the American practice, where the valuation of the inventory is made by commissioners, it is not conclusive upon the personal representative, but may be explained. *Ames v. Downing*, 1 Bradf. Sur. Rep. 321. Neither will it excuse the personal representative, to account for the inventory in all cases. He must account for all for which the property sells. The inventory is but *prima facie* the basis of his accountability. There are many other cases bearing upon the question of an inventory of the estate, but not of sufficient importance to be referred to much in detail. At an early day it was decided in New

tice, * the appraisal is made by commissioners appointed by * 218 the probate court for that express purpose, who are sworn to make a true appraisal of all the goods, effects, &c., which shall be shown them by the executor or administrator, as belonging to the estate.

11. Personal estate in the possession of the deceased, as trustee, or as a naked depositary, does not so become a part of the estate as properly to be included in the inventory; but will be embraced in the estate devolving upon the personal representative, and will be held by him in the same manner it had been by the deceased, until he can regularly relieve himself from the charge, by making delivery to the party entitled to receive the same.²¹ But if it be in money, or its equivalent (unless it be of money in a bag, or other container not to be used by the decedent), as money has no ear-mark, it will become a portion of the estate, and will create a mere indebtedness, and must therefore be embraced in the inventory.²¹

12. Property coming into the possession of the personal representative, after an inventory has been returned, should be entered upon an additional inventory. And in Connecticut the proper remedy for an omission to do so, was held to be by suit upon the bond for faithful administration.²²

Hampshire that executors and administrators were bound to inventory provisions belonging to the estate. *Griswold v. Chandler*, 5 N. H. 492. The judge of probate has no discretion to reject an inventory, because the title to the property is in dispute. *Gold's case*, Kirby, 100. The law presumes that all the property found in possession of the decedent at the time of his decease belongs to his estate. *Succession of Alexander*, 18 La. Ann. 337. The residuary legatee may demand an inventory and account. *Kenny v. Jackson*, 1 Hagg. 105. So also may any party having an interest in the estate. *Myddleton v. Rushout*, 1 Phillim. 244.

²¹ *Trecothick v. Austin*, 4 Mason, 16, 29. And where the personal representative receives money deposited in a savings bank in the name of the decedent as trustee for a married woman, he thereby becomes personally responsible to her for money had and received. *Farrelly v. Ladd*, 10 Allen, 127. And where the intestate had executed and delivered a promissory note for good consideration and subsequently received the note of the payee for safe custody and claimed it till his decease, when it came into the hands of his administrator, who refused to deliver the same to the payee, it was held she might maintain an action against the estate to recover the amount of the note, declaring upon the note as a subsisting contract. *Prescott v. Ward*, 10 Allen, 203.

²² *Moore v. Holmes*, 32 Conn. 553. And in the very recent case of *Homer's*

Appeal, 35 Conn. 113, it was held that where a third person claims property in the hands of an administrator the Court of Probate has no power to try the question of title, and to make an order that the administrator deliver the property to the claimant. The opinion of the court by *Park, J.*, is brief, and may be useful as a practical commentary upon the mode of disposing of such questions. The only mode of disposing of a question of this kind would seem * 219 to be by an action * at common law. The learned judge said : " It appears in this case, that while the estate of Mary R. Mason, deceased, was in process of settlement in the Court of Probate for the district of Suffield, Jarvis K. Mason appeared before the court, and claimed that, as her husband, he was by law trustee of her estate, and as such trustee was entitled to the possession of all the personal property belonging to the estate during his life, and moved the court to reject the distribution that had been made of the estate, and pass an order requiring the administrator to deliver to him all the personal property belonging to the estate that was in his possession. The court entertained the motion, and decided that the said Jarvis K. Mason was trustee of the estate, and as such trustee, was entitled to the possession of all the personal property belonging to the estate during his life, and thereupon rejected the distribution that had been made of the estate, and passed an order requiring the administrator to deliver into the possession of said Mason all the personal property belonging to the estate, that was found to be in his possession when he settled his administration account. From this order the appellant, an heir-at-law of Mary R. Mason, appealed to the Superior Court, which affirmed the decree of the probate court, and he now brings the case here by a motion in error.

" It is manifest that the Court of Probate had no authority to pass the order appealed from. It was decided so long ago as Gold's case, reported in Kirby, 100, that a Court of Probate ought not to reject an inventory of an estate, the title of a part of which is in dispute, for if any part of the estate is claimed by a third person, the parties have the right to try the title at common law. Much less, in the case under consideration, could the probate court try and determine in this summary mode the title to property in dispute, and pass an order upon the administrator requiring him to deliver possession of the property to the party in whose favor the decision was rendered."

There is also another decision of the same court at the same term, Mix's Appeal, 35 Conn. 121, which seems to have a very important practical bearing upon questions connected with the responsibility of the personal representative for property returned to the probate court upon the inventory as belonging to the estate. The points decided here seem to be, that where the administrator inventoried all the property that was in the possession of the intestate, at his decease, as being property belonging to the estate, and on his first accounting charged himself with the entire inventory, that upon discovering that the whole property was not in the decedent at the time of his decease, he might claim a credit on his final account sufficient to balance the amount with which he had overcharged himself. But it was held, that in the Appellate Court those interested in the estate could not give evidence with a view to charge the administrator with other property not claimed in the court below, or coming within the range of the issue formed at the time of taking and entering the

appeal. The opinion of the court was delivered as follows, by *Carpenter, J.*: “ On the twenty-eighth day of June, 1864, the appellant, as administrator on the estate of Joseph E. Webster, deceased, presented to the Court of Probate an administration account, which was intended as a preliminary, and not as the final account, in which he erroneously, and through mistake and inadvertence, charged himself with the whole of the personal property embraced in the inventory, only twenty-six eightieths of * which belonged to the estate. * 220 In his final account he attempted to correct the mistake, by charging to the estate the sum of \$419.85, that being the amount erroneously charged to himself in the first account. The Court of Probate refused to allow this item, and he appealed to the Superior Court. The Superior Court reversed the judgment of the Court of Probate, and decreed that that amount should be allowed the appellant. On the trial in the Superior Court the appellees objected to the evidence offered to prove the mistake, upon the ground that the decree of the Court of Probate, allowing the first account, was conclusive. We are not disposed to question the proposition that a decree of a court of probate, unless appealed from, is final and conclusive upon the parties, as to all matters within its jurisdiction which are necessarily involved in the issue. The question here is, whether this case falls within that principle. A distinction is to be observed between orders and decrees made during the settlement of an estate, which are merely *preparatory* to a final settlement and distribution, and a final decree adjusting and closing an administration account. The latter only possesses the elements of a final judgment; the former are preliminary, and subject to change or modification, as the exigencies of the case and the demands of justice may require. We believe the practice has been, and now is, for the Court of Probate, in adjusting the final account, to rectify all mistakes in the prior proceedings. Thus property embraced in the inventory which belongs to other parties, is charged to the estate in the administration account, and no probate judge hesitates to allow it. No one will seriously contend that the decree of the court accepting the inventory is conclusive upon the administrator as to the title of all the property therein named. If an administrator, in making a return of sale of real or personal property, makes a mistake in the amount realized, we know of no principle prohibiting the Court of Probate from rectifying the mistake in the settlement of the administration account. We cannot see why the court should not apply the same rule to a mistake in a mere preliminary statement of an account, especially if it is not intended by the administrator, nor regarded by the court, as a final account.

“ Courts of probate, as to all matters within their jurisdiction, are clothed with chancery powers, so far as may be necessary to enable them to do full justice between the parties. As a court of chancery will, in passing a final decree, correct mistakes, if any, in the interlocutory orders and decrees, so will a court of probate, in furtherance of justice, correct mistakes in its prior proceedings. We ought not therefore to give the decree in question the force and effect of a final decree. For these reasons we think the Superior Court did right in admitting evidence to prove the mistake.

“ Another question is made concerning the admission of evidence, offered by

the appellees and rejected by the Superior Court, to prove that the appellant had received certain personal property belonging to the estate, which was not inventoried, and not accounted for in the administration account. The pleadings do not present a formal issue ; but under our practice the case stands upon the general issue, or a simple denial by the appellees of the truth of the allegations contained in the reasons of appeal. If so, that, and that alone, so far as questions of fact were concerned, was the issue to be tried. As the pleadings contain no reference to this matter, we think the court did * 221 right in excluding the * evidence. But suppose all that the appellees claim in this respect to be true, what then? We do not see how that can affect the propriety of the appellant's charge. The error of the probate court in rejecting that must still be corrected ; and we know no better way than to allow that charge, and leave the appellees to their appropriate remedy, — a suit on the bond."

* CHAPTER VIII.

* 222

THE AUTHORITY OF THE PERSONAL REPRESENTATIVE IN DIS-
POSING OF THE EFFECTS.

SECTION I.

THE AUTHORITY OF JOINT EXECUTORS AND ADMINISTRATORS.
DISTRESS.

- 1, and n. 4. Each executor and administrator is seised of the entirety of the estate and may convey the whole title.
2. Joint executors, &c., may each convey the whole of a term for years.
3. One executor, &c., cannot be sued, at law, by the others. The remedy is in equity.
4. Executors, &c., could not have distress for rent, at common law, but do by statute.
5. Where it exists in America, it is generally regulated by statute.
6. Brief suggestions as to the remedy in the American states.
7. The act of one binds all in regard to payments or compromises.
8. How far one joint executor may obtain redress, for the other's withholding of the securities of the estate.

§ 31. 1. JOINT executors and administrators are possessed of the estate, each as of the entirety, and consequently the act of each is the act of all.¹ Hence, if one sell a portion of the estate and releases, it will carry a valid title.² So if one of several executors release his part of a debt due the estate, it will discharge the whole.³ And the executor selling a portion of the estate, or making any other contract in the course of the settlement of the estate, may sue the contract, in his own name, counting upon the special terms of the contract, or he may sue in the name of all the executors or administrators, treating his act as that of all.⁴

¹ Bac. Ab., Exrs. and Admsrs. D. 1; Godolph. 134.

² 1 Wms. Exrs. 818.

³ Godolph. 134.

⁴ *Brassington v. Ault*, 2 Bing. 177; *Heath v. Chilton*, 12 M. & W. 632; *Nation v. Tozer*, 1 Cr., M. & R. 172, 174. But it is not to be inferred, from one of two or more joint executors or administrators, possessing the power of the whole, that each can, by an admission merely, create a debt against the

* 223 * 2. So if two executors or administrators have a term, and one grant all that belongs to him, the entire estate will pass, since there is no partition of estate, as between joint executors⁵ or administrators.

3. So also, as one party cannot sue himself, or in other words, cannot be both plaintiff and defendant in the same action, it will follow, that where one of the joint executors or administrators is indebted to the estate, the others cannot unite in a suit at law against him, but must seek redress in equity.⁶ But after the death of the executor indebted, the surviving executors may at law bring an action against his personal representatives.⁷

4. At common law, the executor or administrator of a deceased lessor could not distrain for rent in arrear at the time of the

estate where none existed before. Such an admission will be treated as *prima facie* sufficient, but is subject to disproof by the other executors, &c., or even by the party making it. *James v. Hackley*, 16 Johns. 273. In later cases in New York this rule is qualified. It seems to be now considered that the admission is only evidence against the party making it, and will not justify a recovery against a co-executor, &c., unless there is independent proof of the debt having once existed against the deceased. *Hammon v. Huntley*, 4 Cowen, 493; *Forsyth v. Ganson*, 5 Wendell, 558; *M'Intire v. Morris*, 14 Wendell, 90. But we should regard the correct rule as that laid down in *James v. Hackley*, *supra*.

The general right of one executor to bind the whole, and thereby to convey title to the effects belonging to the estate, is carefully considered in *Hertell v. Bogert*, 9 Paige, 52, and the principle declared by the learned Chancellor thus stated: "Two or more executors are regarded in law as one person, and if one of them sells the goods or the securities of the testator, for money, to a *bonâ fide* purchaser, who has no reason to suppose such executor intends to commit a breach of trust, such purchaser will hold the property or securities, not only as against the other executors, but also as against creditors and legatees, he having by such purchase obtained the legal title thereto." *Post*, § 32, pl. 3. One of two or more joint executors is competent to execute a release for a mortgage due the estate, the record of which will discharge the registry. *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Weir v. Mosher*, 19 Wisc. 311. See also the Reporter's note to *Hertell v. Bogert*, *supra*. And a surviving executor has power to execute all trusts committed to two executors by the will. *Miller v. Meetch*, 8 Penn. St. 417. Joint executors have the right to settle their accounts separately, each for himself. *Patterson's Estate*, 1 W. & S. 291.

⁵ *Anon.*, *Dyer*, 23 b.

⁶ *Moffatt v. Van Millingen*, cited in *Mainwaring v. Newman*, 2 Bos. & Pul. 124, and note; ante, § 27, pl. 16.

⁷ *Rose v. Poulton*, 2 B. & Ad. 822.

* decease.⁸ But by statute,⁹ at an early day, the right of * 224 distress for rent in arrear was extended to the personal representative of the party entitled. And by construction of this statute, being of a remedial character, almost every variety of case has been held to come within its intent, although the party had other remedy.¹⁰

5. In some of the American states these remedial English statutes have been regarded as so far incorporated with the common law, at the time of the separation of the Colonies from the mother country, as to have become a portion of the American common law.¹¹ But it is safe to consider that distress for rent in arrear, being a remedy of a peculiar character, by the party acting as his own officer, in enforcing the redress provided by the contract, will not be found much in force in the American states, except so far as it is provided for and regulated by statutory provisions of the state legislatures. And in those states where this remedy is recognized by statute, it will generally be found to have been extended, in terms, to the personal representatives of the lessor, thus placing the matter very much upon the basis of the English statutes existing at the time we assumed a separate nationality.

6. Distress for rent, as far as we know, never existed in some of the American states. It is stated by *Parker*, Ch. J.,¹² that a landlord has no right of distress for rent in Massachusetts, and we are sure the same is true in some others of the New England states, and we presume in all of them. In New York it seems to have existed from the earliest times.¹³ It exists also in Pennsylvania,¹⁴ and in many of the other states west and south.¹⁵ But the remedy has long since become a form of execution merely, to be carried forward by the officers of justice, and not by the party¹⁶ on his own sole responsibility. In New York the assets of the estate are considered the common property of all the execu-

⁸ Co. Litt. 162 a.

⁹ 32 Hen. 8, ch. 37.

¹⁰ *Hool v. Bell*, 1 Ld. Raym. 172, qualifying *Turner v. Lee*, Cro. Car. 471.

¹¹ *Howard v. Ransom*, 2 Aikens, 252.

¹² *Wait*, Appellant, 7 Pick. 100.

¹³ *Lansing v. Rattoone*, 6 Johns. 43.

¹⁴ *Blanche v. Bradford*, 38 Penn. St. 344.

¹⁵ *Hatfield v. Fullerton*, 24 Ill. 278.

¹⁶ *Lansing v. Rattoone*, 6 Johns. 43, citing *Baron Gilbert*. See also *Grubb v. McCoy*, 2 Met. (Ky.) 486.

* 225 tors.¹⁷ * And where lands are devised to three persons, and to the survivor or survivors in trust, and the same three persons are made executors, all living at the time must join in a conveyance, in order to pass the title, and one of the number acting as sole executor cannot convey the title.¹⁸

7. At common law, the discharge of a debt by payment to one of two or more joint executors will be valid. And where joint executors have obtained a decree of the Court of Probate under statutory powers for the compromise of a disputed claim upon some alleged debtor to the estate, an adjustment by either of the executors will be treated as the act of both.¹⁹

8. One joint executor cannot maintain a suit against his co-executor for a decree, requiring the latter to place in his possession the papers and securities belonging to the estate, and now in a bank, and that all moneys thereafter collected by either shall be deposited in the bank, to the joint credit of both, to be drawn out only by their joint check, on the ground that the joint executor maintains the exclusive manual possession of the securities belonging to the estate, and refuses to admit the co-executor to any joint control of the same; certainly not, in the absence of all proof that those interested in the estate will thereby be exposed to loss. The defendant being in possession of the papers has the same right to retain them as the plaintiff to claim them. All the other can properly demand is, that, whenever the presence of the securities, or any of them, is required in the settlement of the estate, they shall be produced. If there was mismanagement of the effects of the

¹⁷ *Paff v. Kinney*, 1 Bradf. Sur. Rep. 1.

¹⁸ *Williams v. Mattocks*, Admr., 3 Vt. 189. But the survivor may always convey the title. *Chandler v. Rider*, 102 Mass. 268.

¹⁹ *Gilman v. Healy*, 55 Me. 120. In *Charlton v. The Earl of Durham*, 17 W. R. 348, before Vice-Chancellor *James*, it was determined, that the receipt of one joint executor for moneys due the estate was a good discharge both at law and in equity. And where the debtor had continued to pay interest upon the debt for twenty years, this is not sufficient notice to him that the estate had in the mean time been administered, and the executors become trustees so as to disentitle him to treat the receipt of *one* of them as a valid discharge. s. c. L. R. 4 Ch. App. 433. But where the executors were also trustees, and, as such, employed solicitors to receive money of a railway company which had taken lands belonging to the trust, which the solicitors paid to one of the trustees, taking his receipt for the same, and the money failed to reach the trust by reason of his bankruptcy, it was held, the solicitors were responsible to the trust to restore the money. *Lee v. Sankey*, L. R. 15 Eq. 204.

estate, or refusal to apply them at the proper time, application should be made to the probate court for the necessary order.²⁰

SECTION II.

DISPOSING OF THE ASSETS.

1. The executor, &c., has general power to dispose of all the personal effects of the deceased. Exceptions.
2. Things specifically bequeathed, after the assent of the executor, not under his control. But a bonâ fide purchaser of the executor will acquire good title.
3. And if the property consist of securities payable to two executors, who are special trustees under the will, one of them cannot dispose of the securities without the privity of the other.
- 4, and note 10. The executor, &c., primâ facie entitled to pledge or mortgage the effects.
5. But where the party making advances is put upon inquiry his title may be impeached.
6. The purchaser cannot accept the assets in payment or security of a debt due himself.
- n. 16. Nor in any case where he understands the executor is acting malâ fide.
7. Executor cannot himself purchase. All profit thus made belongs to the estate.
- * 8. The power to sell leaseholds does not justify under-letting them. * 226
9. Conditions, and covenants against alienation, do not extend to executors and administrators.
10. Equity will not relieve against forfeitures incurred by alienation.
11. The purchaser of assets, charged specially, must see to application of purchase-money. Query?
12. The true rule seems to be, that the payment of the money to him who is selected to make the application will be sufficient.
13. But actual fraud upon the power will always vitiate the title of the purchaser.
14. Executor, &c., may indorse bills and notes; or sell choses in action at a discount.
15. A special and personal trust or power, reposed in the executor, cannot be delegated.
16. In these cases, where an election is not personal, it devolves upon the personal representative.
17. The distinction between legal and equitable assets considered. Not important here.
18. Statute of limitations operates upon constructive trusts.
19. The real estate becomes assets whenever it appears there is a deficiency of personality to pay debts.
20. The executor may dispose of real estate to pay legacies in conformity with the directions of the will.
21. And in all cases the executor, in disposing of the real estate, must strictly conform to his powers.

²⁰ *Burt v. Burt*, 41 N. Y. 46; *Wood v. Brown*, 34 id. 337. The latter case distinguished and limited, by *Burt v. Burt*, supra.

22. Fraudulent sales by an executor, for his own, or the benefit of others, not upheld.
23. Such sales only convey the title of the decedent, of which the purchaser is presumed cognizant.
24. The personal representative must assert his right to dispose of real estate in a reasonable time.
25. All the executors or administrators must join in a petition for sale of real estate.
26. Such license gives no power to encumber the real estate, but only to sell outright.
27. Grounds of presuming in favor of the regularity of such sales.
28. Where the sale is defective, the price paid by the purchaser must be restored in some way.
29. Mode of proceeding, to enforce payment of annuity or legacy, charged upon real estate.
30. Remedy for money of legacies charged on land.
31. Circumstances may justify disposing of stock below par, contrary to the expressed wishes of the testator.
32. Trustee must be faithful, and serve the interest of the trust.
33. There is no necessity to supplement a power conferred by the will, by a license to sell.

§ 32. 1. THERE is no proposition in the law better established than that the personal representative may sell any or all the personal estate of the deceased. This is briefly but fully declared by Lord *Mansfield*,¹ Ch. J., and is sufficiently set forth by us in another place.² There being no question in regard to the general
 * 227 right of * the executor or administrator to dispose of the personal property and effects belonging to the estate represented by them, it is only important to inquire into the precise

¹ *Whale v. Booth*, 4 T. R. 625, in note to *Farr v. Newman*; s. c. 4 Doug. 36; ante, § 17, pl. 2, and note.

² Ante, § 17. Thus in the recent case of *Hough v. Bailey*, 32 Conn. 288, it was held, that the administrator of an intestate estate has such power to convert all the personal assets of the estate into money, that if he improperly dispose of a promissory note, as if he should transfer it to an innocent purchaser, without receiving money or its equivalent in payment, or in any other respect not in strict conformity with his duty as administrator, this might render his sureties liable upon his bond, but would not defeat the title of the vendee or assignee. And where the executor was directed in the will to carry on the business of the testator for a term of years, being a brewery, for the benefit of the estate, and then deliver it, with its contents, to the residuary legatee, it was held that the moneys arising from carrying on the business became assets in the hands of the executor for which his sureties were holden. *Gandolfo v. Walker*, 15 Ohio, N. S. 251. A sale by the personal representative of property, which he has no power to sell, is absolutely void, and he cannot recover the price of the purchaser. *Beene v. Callenberger*, 38 Ala. 647. And see *Phelan v. Bird*, 20 La. Ann. 355.

qualifications and limitations, which it has become necessary to affix to the rule in the course of its practical administration.

2. It has been made a question whether the personal representative can so dispose of chattels specifically bequeathed, as to convey good title against the legatee, where there are no debts against the estate requiring the sale.³ But some of the more recent cases than *Humble v. Bill*³ seem to recognize the right of the executor to so deal with such property, notwithstanding the reversal of that case.⁴ Upon principle, it would seem, as the title of the specific legatee is perfected by the assent of the executor to the bequest, which is a formal relinquishment of all claim upon the specific thing for the payment of debts, that after this assent the executor could not so dispose of the thing thus specifically bequeathed as to create a valid title; and such is evidently the opinion of two very eminent law-writers.⁵ But as the purchaser of the executor does not derive title under the will, he will not be affected with notice of the specific bequest;⁶ and unless the executor had given a prior assent to the bequest, so as to perfect the title of the legatee, we perceive no reason why the title of a bonâ fide purchaser of the executor may not be held good against the legatee or his assignee; and such would seem to be the general course of the more recent decisions upon the point.⁷

3. But it has been determined, upon great consideration, that where a note or other security is given to two or more executors jointly, who hold the same under special trusts, that the legal title is in all the executors the same as if it had been given to them as * trustees under an ordinary trust, and the concurrence of all the payees or trustees is necessary in order to transfer the legal title of such note or security to a purchaser.⁸ This was where two * executors and trustees, * 228 * 229

³ *Humble v. Bill*, 2 Vernon, 444, which in the Court of Chancery is decided in favor of the right of the executor to mortgage a term specially bequeathed, and that the legatee should redeem or be foreclosed; but the decree was reversed in the House of Lords.

⁴ *Ewer v. Corbet*, 2 P. Wms. 148; *Burting v. Stonard*, id. 150; *Langley v. Lord Oxford*, Ambler, 17.

⁵ 1 Wms. Exrs. 840, and note; 2 Sugden on Vendors, 56.

⁶ *Brush v. Ware*, 15 Pet. U. S. 93.

⁷ *Spackman v. Timbrell*, 8 Sim. 253; *Hertell v. Bogert*, 9 Paige, 52.

⁸ *Hertell v. Bogert*, 9 Paige, 52. But where the executors were charged with a special trust under the will, to pay an annuity, and were directed to

under a power contained in the will, sold a part of the real estate of the testator, and took a bond and mortgage upon the prop-

retain in their hands, out of certain securities named, sufficient for that purpose, it was held that a release by one of the executors of a portion of the designated securities could not be considered inoperative on the ground of the special trust, unless after the settlement of the estate had been closed, the securities remained in the hands of the executors on this special trust, or at all events, unless it appeared that there was not sufficient of these securities remaining to meet the annuity. *Weir v. Mosher*, 19 Wisc. 311. Where property comes into the hands of executors, who are also trustees for retaining and administering the same property, the title as trustees vests immediately after the estate is closed and the office of executor ceases. *Sparks v. Weedon*, 21 Md. 165. It was held, in a recent case, *Alther v. Bassett*, 22 Md. 509 (somewhat at variance we should conjecture with the general current of authority, where a registry of title to real estate exists), that a devisee under a will of real estate, charged with the payment of debts and legacies, has full power to sell, and the purchaser acquires good title, without any duty of seeing to the application of the money. This could only be maintained, consistently with principle, where the will conferred a power of sale to save the money to pay legacies. Where the executor or administrator, having power to sell property belonging to the estate, makes a colorable transfer for the purpose of transmitting the title through the purchaser to himself, it will not affect the title, and he will still be decreed a trustee for the next of kin. *Joyner v. Conyers*, 6 Jones, Eq. 78. But the mere fact that the executor has sold land for less than its fair value will not render him responsible for the deficiency, provided the sale is fair, and the best price obtained which could be at the time and under the circumstances. *Springer's Estate*, 51 Penn. St. 342. But one who receives the assets of the estate from the executor, knowing, or having the means of knowing, that he is thereby misapplying them, will be held a trustee for the estate; and the application by the testator of the assets of the estate in payment of his own debts will be regarded such a breach of trust as will enable those interested in the estate to follow the goods into the hands of the purchaser with knowledge of these facts. So, also, where the executor being one of a trading firm, and with the knowledge of the other partners, mixed the funds of the estate with those of the partnership, and they were thus employed in the trade, it was held that the firm were responsible for the funds to a legatee under the will, and it will not exonerate them, that the goods have been carried to the account of the executor, and the account, as to these goods, closed on the books. *Colt v. Lasnier*, 9 Cowen, 320. So, too, the purchaser from the executor of a chattel specially bequeathed, knowing there are no debts, takes it subject to the bequest. *Garnett v. Macon*, 6 Call, 308. The executor may dispose of leaseholds by way of mortgage with power of sale. *Russell v. Plaice*, 18 Beav. 21; *Miles v. Durnford*, 2 DeG., M. & G. 641. But a lessee who accepts a lease from the executor with full knowledge must show that it was properly executed in the due course of administration. *Keating v. Keating*, L. & G. 133. Merchants who

erty to secure the purchase-money, payable to them jointly. Afterwards one of them, without the privity of the other, and when the money was not wanted for the purposes of the trust, sold and assigned such bond and mortgage, and misapplied the proceeds, and failed, being largely indebted to the estate. It was held not to be a valid sale and transfer of the legal title; and that the purchaser could only claim to be protected in equity, so far as the money or securities given by him to the trustee of whom he purchased could be shown to have come to the use, or in aid of the purposes of the trust.

4. It seems to be considered in the English courts, that because the executor and administrator have full power to dispose of the effects of the estate by an absolute sale, that it must follow, as a * necessary consequence, that they may create a valid * 230 lien or mortgage upon the same.⁹ But the cases just cited,

by direction of their correspondent, an executor, applied a fund which they knew constituted part of the assets of the estate, in satisfaction of advances made by them in the course of trade, to relieve the embarrassments of their correspondent, were held to be responsible for the amount so applied to the general pecuniary legatees under the will. *Wilson v. Moore*, 1 My. & K. 337. This general subject is extensively discussed in a recent case in Connecticut. *Wilmending v. Russ*, 33 Conn. 67. But the mere fact that a note is made payable to one as trustee is not sufficient notice of the trust to affect a bonâ fide purchaser of the note without notice of the trust. *Ashton v. Atlantic Bank*, 3 Allen, 217. But the authorities are not much examined here, and the case seems to be placed mainly upon the ground, that the note was negotiable paper, and that the trustee, for many purposes, might legally dispose of the same, in raising money to meet the demands of the trust. And in the late case of *Atkinson v. Atkinson*, 8 Allen, 15, it was held that shares in a corporation issued to one, as guardian, and transferred by him in payment of his personal debt, may be pursued in the hands of the purchaser, as trust property, but if the trust does not appear on the certificates, and the trustee sells them to a bonâ fide purchaser, he will hold them relieved of the trust. *Ib.* It was held in an early case that where the mortgagor became executor of the mortgagee and inventoried the mortgage securities as part of the assets of the estate, and subsequently mortgaged the same premises to a third party, with covenants of warranty, that the assignee of the later mortgage should be preferred to the assignee of the former one under the executor. But the case seems to be decided on the ground of the estoppel upon the executor and his assignee, and not of the merger or extinguishment of the debt. *Ritchie v. Williams*, 11 Mass. 50.

⁹ Lord *Hardwicke* in *Mead v. Orrery*, 3 Atk. 235, 239; Lord *Thurlow* in *Scott v. Tyler*, 5 Dick. 712, 725; Lord *Eldon* in *M'Leod v. Drummond*, 17 Vesey, 154.

and some others already referred to in this section, are carefully reviewed by Lord *Loughborough*, Chancellor, in the case of * 231 *Andrew v. Wrigley*,¹⁰ and * their extension of the powers

¹⁰ 4 Br. C. C. 125, and Mr. Eden's note upon the point, which is too valuable to be omitted. "The doctrine and cases upon this subject were much discussed in the late cases of *Hill v. Simpson*, 7 Vesey, 152; *Taylor v. Hawkins*, 8 Vesey, 209; *M'Leod v. Drummond*, 14 Vesey, 353, affirmed by Lord *Eldon* upon appeal, 17 Vesey, 152. The extent of the power of the executor over the property which he takes from his testator, as collected from several passages in the very luminous judgments delivered in those cases, may be thus shortly stated. Though executors are in equity mere trustees for the performance of the will, yet, in many respects and for many purposes, third persons are entitled to consider them as absolute owners. The mere circumstance, that they are executors will not vitiate any transaction with them; for the power of disposition is generally incident, being frequently necessary; and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. In a greater variety of cases, also, an executor may be taken to be entitled even to pledge the assets. But though dangerous to restrain the power of purchasing from him, it seems to be clear, that the assets, when known to be such, shall in no case be applied to the payment of the executor's debt; and even if it appears that the person advancing the money upon a pledge of the assets has any knowledge of an intended application, not conformable to or connected with the character of executor, he shall be held liable; for though there is considerable difference between advancing money at the time upon security, and taking a security in discharge of an antecedent debt, yet, if it should appear in the transaction, that the borrower is about to apply the money raised on the testator's property to objects with which his affairs have no connection, the lender shall be held answerable." Where the testator being indebted to a bank at the time of his death had deposited with them the title-deeds of an estate, and also by his will allowed his executors to charge his real estate in aid of the personal estate; and his widow and sole executrix was allowed by the bank to draw on the "executorship account" of the estate; and had deposited the title-deeds of part of the testator's real estate as security for the increased amount due to the bank and future advances; the moneys being drawn out by the executrix from time to time, in small sums, and applied to her own personal expenses, and in carrying on the testator's farm, as well as in payment of his debts; it was held, in the absence of any notice to the bank, that the executrix was not committing any breach of trust in applying the money to her own purposes; they were entitled in a suit for administering the estate, to prove as executors for the amount of their advances on the executorship account raised by the deposit of the title-deeds of the testator's real estate by the widow and executrix. *Farhall v. Farhall*, Law Rep. 7 Eq. 286. It seems to be recognized as a settled principle of the English law that the executor may assign the assets of the testator for the benefit of creditors. *W. & S. Banking Co. v. Marston*, 7 H. & N. 148.

of the executor in disposing of the assets in his hands considerably limited. We are not prepared to say, that, as a general rule, the executor or administrator may not have power to mortgage or pledge the effects belonging to the estate, to a bonâ fide mortgagee or pledgee, who in good faith advances money in consideration of the contract and assignment of the executor, &c. It would seem that a mortgage or pledge under such circumstances, with nothing more, must be held valid, since no stranger can safely be said to be bound to know, from the mere fact, that the effects form part of the assets of the estate; that the personal representative, who attempts to dispose of them in that mode, is dealing unfairly with them, and going beyond the lawful demands of his office, since there are many occasions where the executor or administrator may have just reason to raise money in that mode, to meet the exigencies of his position. He may be compelled to pay a mortgage debt upon real estate, at a particular time, to save a foreclosure of the title, and the time may not be sufficient to effect that by a sale, or there may be other conditions or limitations which may impose a similar necessity upon him. And if there are any such emergencies sufficient to explain his conduct to the purchaser, he will not be regarded as acting in bad faith in consenting to accept the security. His contract is, therefore, *primâ facie* good.

5. But the occasions for creating such contracts on behalf of the estate are so few, that slight circumstances of suspicion will be regarded as sufficient to put the mortgagee upon inquiry. And in such cases, if the fact was that the money was raised for private purposes by the executor, and, this upon proper inquiry, would have been ascertained by the party making the advance, he will stand in no better light than if he had received a pledge or mortgage of the effects of the estate upon the private account of the personal representative, and cannot enforce his security, except to the extent that he can show that the money advanced by him actually * went for the purposes of the estate, in the payment of debts and legacies or otherwise.¹¹ * 232

6. And it seems to be entirely well settled, notwithstanding some exceptional cases, that an executor or administrator cannot sell or mortgage the assets of the estate in payment or security of

¹¹ *Green v. Sargeant*, 23 Vt. 466, where the rights of parties so circumstanced are considerably discussed.

his own debt, that being known at the time to the creditor.¹² There has been some vacillation in the cases in regard to what will constitute evidence of connivance on the part of the creditor of an executor in accepting the assets of the estate in payment or security for his own debt. It is laid down by *Bayley, B.*,¹² that the executor may make an effectual disposal of the assets in consideration of a debt of his own, and to discharge his own debt, if there be no fraud in the creditor in accepting of such disposal. But this leaves the whole question open as to what shall constitute such fraud. There seems no doubt that if the goods be taken at a price greatly below their apparent and obvious value, although the payment be made in money, it will be regarded as fraudulent.¹³ And it seems to be now settled, that the mere fact that an executor applies the assets in payment of his own debts, the creditor knowing them to be such, will be held fraudulent. Lord *Cottenham*, Chancellor,¹⁴ thus states the rule: "One obvious example (of a fraudulent purchase) is, where a devisee has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware or has notice that such is its object." The executor or administrator has a full power of sale, but under a trust, to convert the same into money for the settlement of the estate. If the purchaser has no knowledge that the sale is not within the power, his title is good, and he is under no obligation to see to the application of the purchase-money.¹⁵ But where he has knowledge that the sale is not within the equity of the trust under which the power was created, he thereby assumes the

* 233 hazard * of seeing to the application of the purchase-money, and his title is valid only to the extent to which that application is shown to have been made.¹⁶ The same rule, in this

¹² *Doe v. Fallows*, 2 Crompt. & J. 481. But the soundness of this decision is questioned by Mr. Justice *Williams*. 1 Exrs. 849, n. (z). Principle of text affirmed in *Rhame v. Lewis*, 13 Rich. Eq. 269; *Thomasson v. Brown*, 43 Ind. 203.

¹³ *Rice v. Gordon*, 11 Beavan, 265.

¹⁴ *Eland v. Eland*, 4 My. & Cr. 420, 426, 427.

¹⁵ Lord *Thurlow*, Chancellor, in *Scott v. Tyler*, 2 Dick. 712, 724; ante, n. 10; *Jones v. Clark*, 25 Gratt. 642.

¹⁶ *Green v. Sargeant*, 23 Vt. 466; *Field v. Schieffelin*, 7 Johns. Ch. 150, 157. It was held in a late case in the House of Lords (*Walker v. Taylor*, 4 L. T. N. S. 845; s. c. 8 Jur. N. S. 681), that the principle of law is well established, that where an executor parts with any portion of the assets of his

respect, seems to apply to an executor, or to any other trustee with a power of sale.¹⁷

7. So, too, it seems to be well settled, that an executor or administrator is under the same disability as other trustees with the power of sale, in regard to becoming himself the purchaser. The sale is not absolutely void, but only at the election of those interested as cestuis que trustent in the sale being made productive.¹⁸ But this election must be made on behalf of the cestuis que trustent in a reasonable time, all things considered.¹⁹ And if the * personal representative made any profit by reason of a pur- * 234 chase for his own benefit, whether in his own name or that of another, he must account for it as part of the estate.²⁰

testator, under such circumstances, that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own benefit, the purchaser is, as if he were himself, in respect of these assets, the executor. And where an annuitant, without the power of anticipation, had squandered the assets, it was held they could only be deducted from the annuity to the extent of the past indebtedness, but could not be withheld on account of future dues. *Pemberton v. M'Gill*, 1 Drew. & Sm. 266. See also *Collingwood v. Russell*, 11 L. T. N. S. 322.

¹⁷ *Pannell v. Hurley*, 2 Coll. C. C. 241, where Vice-Chancellor *Knight Bruce* makes the pertinent and significant inquiry: "Can it be a question in equity whether such a transaction can stand?" See *Waters v. Margerum*, 60 Penn. St. 39; *Tippett v. Mize*, 30 Texas, 361, as to the power of executors and other personal representatives to dispose of the estate, and the mode in which such power should be executed.

¹⁸ *Litchfield v. Cudworth*, 15 Pick. 23; *Hall v. Hallet*, 1 Cox, 134; *Watson v. Toone*, Mad. & Geld. 153; *Winter v. Geroe*, 1 Hal. Ch. 319. But in some cases it has been held that such sale may be rendered valid by the privity and intelligent consent of the cestui que trust. *Lyon v. Lyon*, 8 Ired. Eq. 201. But it was held, in *Gay v. Gay*, 5 Allen, 181, that there is no such trust in regard to real estate, where the personalty is sufficient for the payment of debts, as to preclude the administrator from becoming himself the purchaser of the same from one who had orally contracted with the intestate to sell the same to him, and that the heirs could not maintain a bill in equity to compel the administrator to give them the benefit of such purchase. But in general, where the personal representative, either by the duties of his office or special power, is called upon to dispose of any estate belonging to the deceased, whether real or personal, he cannot himself become the purchaser, either directly or indirectly. *Kruse v. Stiffens*, 47 Ill. 112.

¹⁹ *Elliot v. Merriman*, 2 Atk. 41; *Andrew v. Wrigley*, 4 Br. C. C. 125; *M'Leod v. Drummond*, 14 Vesey, 353, 359, 363; s. c. 17 Vesey, 152. So also in the American states. *Mead v. Byington*, 10 Vt. 116; *Petrie v. Clark*, 11 S. & R. 377; *Green v. Sargeant*, 23 Vt. 466.

²⁰ *Everston v. Tappen*, 5 Johns. Ch. 497; *Piety v. Stace*, 4 Vesey, 620; *Ack-*

8. It has been held that a bequest of leaseholds to executors, with the power to sell and invest for the benefit of persons named, some of whom are infants, will not enable them to grant an underlease; and a court of equity will not enforce a contract for such lease.²¹

9. It seems well settled, that where the lessee is restricted by the terms of the lease from assigning or underleasing, upon penalty of forfeiture of the lease, the forfeiture will not be incurred by the devolution of the estate by act of law upon the personal representative.²² But it seems clear that the executor or administrator, where he is specially named in the restriction upon assignment, cannot assign without producing a forfeiture.²³ But if they are not named in the restriction, it seems questionable whether they are included within its fair construction.²⁴ Upon principle, it would seem that they should be regarded as fairly included within the limitation.²⁵ But in *Seers v. Hind*,²⁶ Lord Chancellor *Thurlow* lays down the law as most unquestionable, that in such case the executor may dispose of a lease for years as assets, notwithstanding a cove-

erman *v. Emott*, 4 Barb. 626; *Case v. Abeel*, 1 Paige, 393. Cases upon this point are too numerous and too uniform to be multiplied. Where the executor or administrator becomes the purchaser of the property of the estate, by contract with the widow and heirs, the price to be paid by a day named, it was decided that, having failed to make payment by the day, he must be held responsible for all sums received on account of any sale made after the day; and if he mixes his own property in the sale of that of the estate, receiving money in part payment and securities for the remainder, the money will be regarded as received on account of the estate. *Parshall's Appeal*, 65 Penn. St. 224. But the personal representative may by leave of the probate court, or for the benefit of the estate, be allowed to purchase at his own sale of the estate. *Armor v. Cochrane*, 66 Penn. St. 308. This must be, of course, subject to the necessity of showing the sale to have been a fair one, and advantageous to the estate.

²¹ *Evans v. Jackson*, 8 Sim. 217.

²² *Parry v. Harbert*, Dyer, 45 b. But it is here doubted if a devise will not operate as a forfeiture, that being a species of assignment. But an assignment, merely by operation of law, will not produce a forfeiture. *Doe d. v. Bevan*, 3 M. & S. 353. And it is here said, that a devise will not operate as a forfeiture, and that this is so considered in *Crusoe v. Bugby*, 3 Wils. 234, and was the general sense of the profession.

²³ *Roe v. Harrison*, 2 T. R. 425.

²⁴ *Ashhurst, J.*, in *Roe v. Harrison*, *supra*.

²⁵ *Sir Wm. More's Case*, Cro. Eliz. 26; *Thornhil v. King*, *id.* 757.

²⁶ 1 Ves. Jr. 294.

nant or promise that the lessee shall not alien. The devise, or lease, may provide even against this; "but it must be very special for that purpose." And it has been held that the executor

* must have notice of the clause against assignment, or his * 235 assignment will not operate as a forfeiture.²⁷

10. The general rule seems to be that equity will not relieve against a forfeiture incurred by conveying contrary to the terms of the tenure.²⁸

11. There is one distinction in regard to the duty of the purchaser of property, held under a trust power of sale, to see to the application of the purchase-money to the purposes of the trust, which we cannot regard as resting upon any just principle; but it seems to be pretty generally recognized in the cases where the question has arisen. We refer to the cases where it has been held, that if the estate is charged with the payment of debts generally, it will not be required that the purchaser look to the application of the purchase-money; but that where the estate is devised for the payment of specified debts, he must see to the application of the purchase-money.²⁹ This is attempted to be justified upon the ground, that in the one case the trusts being specifically declared, it becomes more practicable for the purchaser to see to the application of the purchase-money than if the trust had been entirely general and indefinite, as for the payment of debts generally. This is, indeed, an argument of considerable force, upon the mere ground of inconvenience, or *ab inconvenienti*, as it is called. But upon principle, the distinction seems entirely without a difference.

12. We apprehend that the true distinction will be found to be embraced in the hint thrown out in a late case,³⁰ that, where the devise implies a confidence reposed in the executor or trustee, as to the application of the purchase-money, and the power of sale is unlimited, the purchaser will always be exonerated from any further responsibility by the payment of the money into the hands of the person in whom that confidence is reposed, unless he is acces-

²⁷ *Northcote v. Duke*, 2 Eden, 319; s. c. Amb. 511.

²⁸ *Lovat v. Lord Ranelagh*, 3 Ves. & B. 24; *White v. Warner*, 2 Mer. 459; *Reynolds v. Pitt*, 19 Vesey, 134. But query, when the act is done in ignorance of the law, or of the fact of the prohibition. *Cox v. Brown*, 1 Ch. Rep. 170.

²⁹ *Gardner v. Gardner*, 3 Mason, 178, 218; *Elliot v. Merriman*, Barnard. 78; *Shaw v. Borrer*, 1 Keen, 559, 574; 2 Story, Eq. Jur. 1127, and cases cited.

³⁰ *Stroughill v. Anstey*, 1 DeG., M. & G. 635.

sory to some purpose of misapplying it. But the general distinction already alluded to, between a general charge for the

* 236 payment * of debts and a charge for the payment of particular debts, with a power of sale in either case, express or implied, seems to be maintained in the American courts.³¹ But it seems to us that the power of sale in the executor implies a special confidence in him for the application of the purchase-money, and to go beyond that is being wise above what is written or fairly implied.

13. There is no question that in all cases of collusion with the executor or trustee, in regard to purchases under a power given him, the title will be thereby vitiated. For there is no transaction so sacred, or so clear of all defect of authority, but that positive fraud or collusion will avoid it. And the forms and endeavors of such collusion are so diversified, that it would be idle to attempt to enumerate them.

14. It is scarcely necessary to say that it is competent for the personal representative to indorse notes and bills made payable to the order of the decedent.³² And the executor may sell choses in action, belonging to the estate, at a discount, without raising any implication of fraud,³³ or he may compromise claims due the estate

³¹ *Andrews v. Sparhawk*, 13 Pick. 393, 401; *Hauser v. Shore*, 5 Ired. Eq. 357; *Cadbury v. Duval*, 10 Penn. St. 265, 267.

³² *Robinson v. Stone*, 2 Str. 1260; s. c. nom. *Rawlinson v. Stone*, 2 Burrow, 1225; *Walworth*, Chancellor, in *Hertell v. Bogert*, 9 Paige, 52. But this official indorsement by an executor or administrator has only the effect to pass whatever title the estate has in the securities, and should, in strictness, be made "without recourse." For it has been held, that by a general indorsement of negotiable securities, the executor will bind himself personally to the indorsee, who may recover of him, in his private capacity, without proof that he exceeded his authority as executor. *Livingston v. Gaussen*, 21 La. Ann. 286. The indorsement by the personal representative of negotiable securities against debtors in other states will confer sufficient title upon the indorsee to enable him to sue, although the representative himself could not sue there. *Riddick v. Moore*, 65 N. C. 382. But the administrator of the effects in another state cannot be called to account in the probate court of the place of domicile. *Brownlee v. Lockwood*, 5 C. E. Green, 239.

³³ *Gray v. Armistead*, 6 Ired. Eq. 74; *Bradshaw v. Simpson*, id. 243; *Wheeler v. Wheeler*, 9 Cow. 34. And in the case of the bona fide payment of a debt due the estate to a married woman, executor, where the husband did not assent to her acting as such, or receiving the money, and where letters were subsequently granted to the co-executor and refused to her, it was held to have discharged the debtor as against the co-executor. *Pemberton v. Chap-*

either on the ground of doubt as to being able to recover judgment or to enforce it. (a)

* 15. Whenever a power of a special and personal character is reposed in the executor or administrator, in the exercise of his own judgment and discretion, he cannot delegate the office to another: *delegatus non potest delegare*. Therefore it is said that where a power of sale is given, it cannot be executed by attorney.³⁴ * 237

16. An executor or administrator may sometimes claim by election, as where the title passes by grant to the executor, and is to be limited or restricted by a subsequent election. It is said that cannot be done by the personal representative, but that the election must be made by the deceased in his lifetime, where no title vests until after the election. We apprehend that where the election depends upon the personal taste and judgment of the donee, it must be made by the party himself, as where the gift or sale is of such a horse as A. B. shall prefer, it must wholly fail unless the election is made during the lifetime of the donee or vendee. But if a contract be payable in the alternative, at the election of the

man, 5 Jur. n. s. 567, in the Exchequer Chamber, affirming the decision of the Court of Queen's Bench; s. c. Ellis, B. & El. 1056. In this case the court were not fully agreed upon the point of the married woman having become executor, her husband having a negative upon her acceptance, and not having given his assent. But the majority of the court, including also Mr. Justice Williams, of whom his brother Willes said he had been consulted and concurred in his judgment, although not present at the argument, and that he "probably had considered the general subject more fully and deeply than any man alive;" the majority of the court thus sustained, held the payment valid. It is not important here to suggest, that probably the same result could not be obtained in this country, where payments are not expected to be made to the executor, as a general thing, or under special authority, until after the probate of the will and the granting of letters of administration. This case seems to have gone considerably upon the *bonâ fide* character of the payment, the debtor having no knowledge of the dissent of the husband, although he did not know the executrix to be a *feme covert*.

(a) *Boyd v. Oglesby*, 23 Gratt. 674. But it has been doubted how far the administrator can legally extend the time of payment upon contracts to the estate. *Landry v. Delas*, 25 La. Ann. 181. But we see no reason for any such distinction, in principle. It must depend upon the particular facts of the case.

³⁴ *Combe's case*, 9 Co. 75 a; *Berger v. Duff*, 4 Johns. Ch. 368; *Williams v. Mattocks*, 3 Vt. 189.

payee, the personal representative may make the election. So, also, as to the continuance of a lease from year to year.³⁵

17. The distinction between legal and equitable assets, which is considerably discussed in many of the English cases, is not very material to be considered here. The distinction has generally been regarded as founded upon the nature of the tribunals by which they are administered.³⁶ But in a recent case³⁷ in the House of Lords, it was declared by Lord *Cranworth* that any thing which an administrator is entitled to receive, as such, virtute

officii, can never be equitable assets; and in considering
* 238 whether * assets are legal or equitable, the question is not whether the estate is recoverable through the agency of the courts of law, or of equity, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator.³⁸ It does not readily occur to us at the moment, how the distinction between legal and equitable assets can be of any practical effect in the settlement of estates in this country, where all the property of the testator is primarily liable for the payment of debts, and where, by consequence, real estate may equally be reached, without any direction of the testator for that purpose, as with it. The question is somewhat discussed by Chancellor *Kent*, in an early case;³⁹ but without presenting any intelligible distinction which could now be maintained. We conclude that all assets, whether legal or equitable, which are in law applicable, in any form or by any court, to the payment of debts, must be applied in the due course of administration, without regard to any special charge by the will.

18. The effect of the statute of limitations in barring claims for property originally held by trust title, is considerably discussed in a recent case⁴⁰ in Connecticut. The point decided is thus stated:

³⁵ 2 Wms. Exrs. 850, and cases cited.

³⁶ 1 Story, Eq. Jur. § 552, and cases cited, where the learned author thus defines the distinction: "They are called equitable assets, because in obtaining payment out of them, they can only be reached through the aid and instrumentality of a court of equity."

³⁷ *Attorney-General v. Brunning*, 6 Jur. n. s. 1083.

³⁸ 1 Story, Eq. Jur. § 552 b.

³⁹ *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 130.

⁴⁰ *Wilmerding v. Russ*, 33 Conn. 67; *Boardman's Appeal*, 40 Conn. 169; *Hearst v. Pujol*, 44 Cal. 230; *Governor v. Woodworth*, 63 Ill. 254. When-

Statutes of limitation have no application to a continuing, open, and acknowledged trust. An administrator continues such open trustee, until the final settlement of his administration account, and after that the statute of limitations begins to run in his favor. So where the administrator sells to himself stocks belonging to the estate, and credits the estate the full market value, transferring the stocks to a friend to hold for him, the transaction is not fraudulent or void, necessarily; but only at the election of the cestuis que trustent, and that in a reasonable time. It is at most a constructive fraud, as opposed to a fraud in fact, and in such cases the statute of limitations applies.

19. The real estate of the decedent, by force of statutes in all the American states, becomes assets in the hands of the personal representative, for the payment of debts in all cases where the personal estate is insufficient for that purpose, and it is not requisite that the personal estate should appear to have been insufficient * to pay the debts at the time of the decease of * 239 the testator or intestate. If in the course of the administration it becomes so, for causes for which the personal representative is not responsible, and there has been no fault on the part of the creditors, the real estate is to be treated as assets to the extent of the actual deficiency of the personalty.⁴¹

ever the trust is repudiated the statute begins to run. *Poe v. Domec*, 54 Mo. 119. See *Carr v. Lowe*, 7 Heisk. 84; *Church v. Newington*, 53 N. H. 595. Equity will not relieve the cestui que trusts who have acquiesced in a perversion of the trust. *Hume v. Beale*, 17 Wall. 336. A person who was trustee under the will, and supposed she received certain real estate as part of the trust under the will, but who in fact acquired no title to it under the will, but who had occupied it for more than twenty years, claiming to hold it as part of the trust, was held to have acquired title to the same by adverse possession. *Paine v. Jones*, L. R. 18 Eq. 320. See also *Youde v. Cloud*, L. R. 18 Eq. 634.

⁴¹ *Evans v. Fisher*, 40 Miss. 643. And where the deficiency in the personalty occurs through the action of the government, it is not to be presumed the government will make compensation, and the creditors will not be compelled to wait for such compensation, or till the application therefor shall be definitely determined. *Ib.* But where the deficiency is created by the distribution of a portion of the personalty to the distributees under the statute, it is not competent for the administrator to sell real estate to supply such deficiency. *Hoffman v. Bennett*, 44 Miss. 322. And as the title to the real estate vests in the heirs at the decease of the ancestor, subject to the necessity of it being required to pay debts, the rents accruing before the estate is

20. So, too, where the debts and legacies are made a charge upon the real estate, that will be regarded as quasi assets in the hands of the executor, and he will be authorized to dispose of the same for the purposes of the will, in the manner therein indicated, either expressly or by reasonable implication.

21. And in both the exigencies pointed out in the two preceding paragraphs, the personal representative must pursue with reasonable strictness the power conferred upon him in the one case by the terms of the will, and in the other by the orders and decrees of the probate court under the statutes, in disposing of and converting such real estate into money, and applying the avails to their proper objects.

22. If the executor sell land to his relatives for a less price than he might obtain from others, and for the purpose of favoring such relatives, to the injury of the legatees, the sale will be held fraudulent and void.⁴² And a merely colorable sale on the part of the executor, to himself or some one on his behalf, will be treated as no sale.⁴³

23. The title acquired by the purchaser at an executor or administrator's sale, is such only as the testator or intestate possessed at the time of his decease. The rule of caveat emptor applies, and the purchaser is presumed to have examined the registry, and to have become informed as to the nature and extent of the title.⁴⁴

24. The personal representative is bound to exercise his right to convert the real estate into assets, for the payment of debts, in a reasonable time; and if he do not, those entitled, as heirs or devisees, may enter and hold the land against him.⁴⁵

sold by the personal representative belong to the heirs, and they may recover them of the personal representative if he has collected them, without the consent of the heir. *Kimball v. Sumner*, 62 Me. 305. But in *Titterton v. Hooker*, 58 Mo. 593, it was held that real estate could only be subjected to the payment of debts, in the settlement of an estate, by pursuing the statute remedies provided for that purpose, and that it was not competent for the creditors to maintain a bill in equity against the heirs to compel such application, as after the administration was closed in the probate court. We suppose cases of fraud, or suppression of evidence, would form exceptions to such a rule.

⁴² *Oberlin College v. Fowler*, 10 Allen, 545; ante, § 17, pl. 6.

⁴³ *Skillman v. Skillman*, 2 McCarter, 388.

⁴⁴ *Walden v. Gridley*, 36 Ill. 523.

⁴⁵ *Hall v. Woodman*, 49 N. H. 295.

25. All the executors or administrators should join in a petition for the sale of real estate ; that is, all who are acting.⁴⁶

26. A license to sell will not confer any right to incumber the real estate, since neither the statute nor the terms of the license, properly interpreted, confers any such power.⁴⁷

27. It often becomes a question of difficulty, and always of importance, to what extent courts and juries will be justified in presuming in favor of the regularity of the proceedings of administrators or executors in the sale of real estate, where the records are defective. After the lapse of the term of the statute of limitations on rights of entry, it may be fair to say that such presumptions will ordinarily be made ;⁴⁸ and sometimes in a less period.

28. And where the sale is defective, but the price has been paid by the purchaser and has gone for the benefit of the estate, it will ordinarily be reimbursed, either by way of subrogation or in some other mode.⁴⁹

29. Where annuities, or, by parity of reason, legacies, are charged upon real estate, and fail to be promptly paid, it is not, as of course, matter of right in the annuitant, or legatee, to have a decree in a court of equity for the appointment of a receiver, with a view to raise the money due by the sale of the estate. That will depend upon the comparative value of the estate and the money due, and any other circumstances affecting the question of the probable ultimate necessity of taking such proceeding in order to raise the money.

30. In one case, where the will required the executor to erect and maintain a fence around the cemetery, and charged all legacies upon the testator's real estate, it was held the executor might maintain a suit in equity against the devisees of the real estate, or their grantees, to recover the cost of such fence.⁵⁰

31. A power in executors or trustees may justify disposing of an unproductive and constantly depreciating stock, at less than par, although contrary to the expressed desire of the testator.⁵¹

32. The general rule applicable to executors and administrators

⁴⁶ *Hannum v. Day*, 105 Mass. 33 ; *Osman v. Traphagen*, 23 Mich. 80.

⁴⁷ *Brown v. Van Duzer*, 44 Vt. 529.

⁴⁸ *Hazard v. Martin*, 2 Vt. 77 ; *Doolittle v. Holton*, 26 Vt. 588 ; s. c. 28 id. 819.

⁴⁹ *Short v. Porter*, 44 Miss. 533.

⁵⁰ *Cool v. Higgins*, 23 N. J. Eq. 308.

⁵¹ *Stephens v. Milnor*, 24 N. J. Eq. 358.

is the same which governs the duty of all trustees. They must act with energy and fidelity in the discharge of their duties, and can make no profit for themselves out of the trust property. All such profit inures to the estate. But losses in the improper use of the trust funds falls upon the trustee, and he is responsible for interest also.⁵²

33. Where the will gives the executor power to sell the real estate, for any purpose connected with the administration, there can be no necessity of obtaining license from the probate court for that purpose.⁵³

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* SECTION III.

THE EXECUTOR OF AN EXECUTOR.

1. The English rule does not prevail here.
2. The estate, upon decease of the sole executor, is represented by the administrator de bonis non.
3. He cannot discharge any special trusts without special appointment.

§ 33. 1. THE English rule, that an executor of an executor shall perform the trusts reposed in the first executor, is so completely abandoned in this country, that we shall occupy no space in discussing the provisions of the law in regard to that question. It was there held, in a recent case,¹ that the executor of an executor was responsible for the devastavit of the original executor under the English statute.²

2. As we have before stated, where a sole executor deceases, the estate must be represented in future by an administrator de bonis non, and if the executor have wasted the estate, his executor will be liable to respond to the administrator de bonis non to the extent of all the specific assets of the first estate coming to his hands, and also for any liability incurred by the first executor beyond that, provided he have assets applicable to that purpose.³

⁵² Whitney v. Peddicord, 63 Ill. 249.

⁵³ Jackson v. Williams, 50 Ga. 553.

¹ Coward v. Gregory, Law Rep. 2 C. P. 153. ² 30 Car. 2, c. 7.

³ Foster v. Wilber, 1 Paige, 537. It will be seen by this case and the authorities cited, that while the ecclesiastical courts had full jurisdiction to call administrators to account, they had no such jurisdiction in regard to executors. But no such distinction ever obtained in this country, it is presumed, since the separation from England.

3. The administrator de bonis non will not be able to discharge any special trust reposed in the executor, unless by special authority conferred for that purpose.⁴

* SECTION IV. * 241

FEME COVERT EXECUTRIX OR ADMINISTRATRIX.

1. As a general rule, in America, the authority of a feme sole executrix or administratrix ceases upon marriage.
2. The rule of the English common law continued the office after marriage, but conferred the effective power upon the husband.
3. Whenever or however the authority of an administration ceases, the remaining portion of the estate devolves upon the administrator de bonis non.

§ 34. 1. As a general rule, in the American states, where a feme sole is executrix or administratrix at the time of marriage, her powers cease from that time, and an administrator de bonis non must complete the administration of the estate,¹ unless there are other executors or administrators, in which case the administration will devolve upon them.

2. But where no statutory provision exists upon the subject, the

⁴ *Ross v. Barclay*, 18 Penn. St. 179; ante, § 10.

¹ Gen. Stat. Mass. ch. 101, § 4. The same rule obtains in some, and it is presumed in most, of the states, by express statutory provision. Gen. Stat. Vt. ch. 51, § 13. This is upon the ground that a married woman cannot continue to prosecute a suit, or to execute an office, after the coverture, without the joinder of the husband, or, as it is sometimes expressed, without his consent, which in the case of suits in court is expressed by his becoming a joint party with the wife. Otherwise the suit abates by the coverture of the plaintiff. It is said in Toller, "If a feme covert be entitled [to administration] she cannot administer, unless with the husband's permission (citing Bl. Rep. 801), inasmuch as he is required to enter into the administration bonds which she is incapable of doing. But if it can be shown that the husband is abroad or otherwise incompetent, a stranger may join in such security in his stead. In either case the administration is committed to her alone, and not to her jointly with her husband." 11 Vin. Ab. 185; 4 Burn's Eccl. Law, 228. This latter writer says administration should properly be granted to the wife alone and not to her and the husband jointly. But it may properly be so granted, if limited to the continuance of the coverture, or it may be granted to the husband alone, in the discretion of the court, even against the wishes of the wife; but with the same limitation, we presume, that it do not extend beyond the duration of the coverture.

marriage of a feme sole will not probably have the effect to terminate the office. She will retain the office in name, but the

* 242 * husband will, in fact, possess all the effective power of administration. The reason assigned for this is, that the husband being responsible for the acts of his wife, even in an official or fiduciary capacity, he must of necessity possess the power of controlling her acts for his own security. The true reason will be found to exist in what the common law regards as the indispensable necessity to the proper creation of the family relation,—unity of authority and singleness of action,—without which the result will ordinarily be confusion and discord. We believe that there is great wisdom in this rule of the common law; and that it is more important to the quiet and good order of society than is commonly understood. And it is certain that the same rule obtains, as one of the fundamental canons of Christianity, everywhere prominently avowed and put forth, both in the oracles of the New Testament and in the history of the Church. But the doctrine of the Roman civil law is somewhat in contrast with this unity of authority and action in families; and it must be confessed that the rules of law deduced from Pagan Rome are becoming more popular, in America, than those of the English common law, and of the English and other national churches throughout the world. We believe this tendency here is more owing to the desire of keeping the wife's estate safe from the casualties resulting from the husband's business, than from any other cause; and to that extent we do not regard the tendency as objectionable, unless carried to a fraudulent extent.² The American states have, to a great extent, escaped from all embarrassments in regard to the extent of the authority of femes sole executors or administrators after marriage, by declaring that it shall cease.

3. It seems to be settled, that so much of the estate as remains

² 2 Wms. Exrs. 867–870, and cases cited; *Derbishire v. Home*, 5 DeG. & Sm. 702, 709; s. c. 3 DeG., M. & G. 80; *Lee v. Armstrong*, 9 M. & W. 14; *Procter v. Brotherton*, 9 Exch. 486. The rule of the common law obtains in New York, where it is held that the power of the husband, where the wife is executrix, is substantially that of an executor. His wife can do no act without his concurrence, and he possesses the power of disposition of the estate. *Woodruff v. Cox*, 2 Bradf. Sur. Rep. 153. He is jointly liable with the wife in the surrogate's court; but where he is a copartner with the testator, he must render the copartnership account. *Marre v. Ginochio*, id. 165. See ante, § 32, n. 33.

unadministered at the time the authority of the former administrator * or executor ceases, whether by death or marriage, or otherwise, will vest in the administrator de bonis non.³ * 243

SECTION V.

THE EXPENSES OF THE FUNERAL AND MATTERS INCIDENTAL.

1. The true rule is to allow what is reasonable, under all the circumstances.
2. This should be so regulated as fairly to meet the public demand.
3. This must be done with reference to age, property, station, &c.
4. The English courts and judges have attempted to define these matters.
5. They finally allowed £20 in the case of insolvent estates, but not as a final limit.
6. In some cases of solvent estates, the courts have made very liberal allowances.
7. But in the case of a nobleman who died insolvent, the rule was held otherwise.
8. Large sums allowed for mourning-rings. The expense to be according to custom.
9. The American cases define no precise rule. Monument allowed.
10. The personal representative responsible for a decent Christian burial.
11. He must be consulted, where that is practicable. The office cannot be performed by a volunteer.
12. The administrator is personally responsible for the reasonable expenses of the funeral of the deceased, if he have assets in his hands, and refuse to pay on request.
13. The expense of mourning for the widow and family cannot be charged by the executor in his account against the estate.
14. Where an administrator, having assets, contracts for gravestones for the decedent, he becomes personally responsible, and the administrator de bonis non having received assets, may be joined.

§ 35. 1. THE rule of the English law in regard to the amount which an executor, or one afterwards administering the estate, may have allowed in his administration account for funeral expenses, has always been based upon the consideration of what was reasonable, under all the circumstances.¹

2. The elements going to constitute reasonableness might not always be stated in the same manner, by those equally familiar with the subject. It is evident those who direct the funeral expenses of a deceased person must be governed, to some extent, by the general opinion and expectation. It is, like all matters of dress and furniture, to be regulated, to a considerable extent, by

³ *Graves v. Downey*, 3 Monr. 353.

¹ 2 Black. Comm. 508; 3 Co. Inst. 202; 2 Wms. Exrs. 871.

* 244 the *feelings of friends and neighbors; and this will conform to the general custom. Like any thing else of this kind, it should, if possible, be such as to attract no attention either way; coming precisely up to the demands of public decency, but in no particular overstepping that safe limit.

3. This will require that due regard be had to the age, standing, property, and habits of life, and modes of living of the deceased, with many other circumstances not possible here to enumerate; since there will be, in almost all cases, more or less which tends to affect the question of funeral expenses, which it is not possible to anticipate in any general enumeration.

4. The English courts attempted to define certain limits to govern the ordinary expenses of funerals, where there was nothing more required than decent Christian burial. Thus, Lord *Holt*, C. J., said,²—“That, for strictness, no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers’ fees, but not for pall or ornaments.” Most of this, in our day and country, is either unintelligible or mere matter of antiquarian research. Lord *Hardwicke*³ said, that “at law, where a person died insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40s., then £5, and at last £10; but this court is not bound down by any such strict rules, especially where a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent.” £60 was accordingly here allowed.

5. In a late case⁴ it was intimated that, as a general rule, in the case of insolvent estates, £20 might be regarded as the proper limit of allowance. But even this limit, in regard to insolvent estates, is by no means regarded as the ultimate extent to which the English courts will go.⁵

6. And in regard to estates entirely solvent, the English courts of equity have made very liberal allowances for funerals, under special circumstances, even at a somewhat early day. For in the case of *Offley v. Offley*,⁶ where £600 had been expended in the funeral, the court directed that it be made a debt upon the

* 245 *trust estate, the deceased being a man of great estate and

² *Shelley’s Case*, 1 Salk. 296.

³ *Stag v. Punter*, 3 Atk. 119. See Bull. N. P. 143; Selw. N. P. 776.

⁴ *Hancock v. Podmore*, 1 Barn. & Ad. 260.

⁵ 2 Wms. Exrs. 873.

⁶ Prec. Ch. 26, in 1691.

reputation in his county, and being buried there; but if he had been buried elsewhere, his funeral might, with propriety, have been more private, and the court would not have allowed so much.

7. But in the case of a deceased nobleman, whose estate was large, his personalty estimated at £40,000, and his debts supposed to be small, and the expenses of the funeral being £2,200, Sir *L. Shadwell*, V. C., refused to allow the account, but referred it to the Master to inquire and state what sum ought to be allowed. In this case, the estate, contrary to all reasonable expectation at the time of the decease, had, in fact, proved insolvent.⁷

8. But in some cases very liberal sums have been allowed for the ceremonials connected with funerals. In one case nearly £100 was allowed for mourning-rings, procured in the discretion of the executors, there being no direction in the will for any such expenditure.⁸ And in an appeal before the Privy Council,⁹ from the Supreme Court of Bengal, it was held, that with regard to the expenses of the funeral of a Hindoo testator, where the will gave no directions, the only question to be considered was, whether the sums allowed were more than had usually been expended at the funeral of persons of the same rank and fortune as the deceased.

9. The American cases have not defined any very precise rule upon the subject. In one early case,¹⁰ the court allowed \$358, on the ground that the deceased had a good estate and no children, the principal expense being for a tombstone. But the court here declined to allow for the expense of a picture of the deceased, painted after his death.

10. It is the duty of the executor, or some one on behalf of the estate, to see that the funeral rites of the deceased are decently performed, and to the extent of assets in his hands the personal representative is liable, in assumpsit, to pay for the expense thus incurred.¹¹ *Putnam*, J., here said, — “ We are all clearly of * opinion that the law raises a promise on the part of the * 246 executor or administrator to pay the funeral expenses, so

⁷ *Bissett v. Antrobus*, 4 Sim. 512. And in *Bridge v. Brown*, 2 Y. & Coll. C. C. 181, a charge of £145 for funeral expenses was virtually disallowed, being reduced to £100.

⁸ *Paice v. The Archbishop of Canterbury*, 14 Vesey, 364.

⁹ *Mullick v. Mullick*, 1 Knapp, 245.

¹⁰ *M’Glinsey’s Appeal*, 14 Serg. & R. 64.

¹¹ *Hapgood v. Houghton*, 10 Pick. 154. In New Jersey an action for the

far as he has assets. If the defendant has no assets, he should plead "the same in bar. And in another case in the same state,¹² it was held that where a person being at a distance from home, sent for his wife and other relatives, and they went to see him, but did not arrive until after his death, and the executor paid the expense of their journey, less than \$12, he should be allowed to charge the same in the account of his administration. And it has sometimes been held in this country, that the personal representative may reckon in his account a moderate expense for mourning apparel for the widow and family of the deceased, as part of the expenses of the funeral.¹³ And this seems to us not unreasonable. It seems far more intimately connected with the decent performance of funeral rites than the same amount expended in a monument, which is now almost invariably allowed, because that is one of the demands of public opinion. But in *Wood v. Vandenburg*¹⁴ it was held, that the erection of a headstone at the decedent's own grave may be considered a part of his funeral expenses, *where the right of creditors cannot be defeated thereby*.¹⁴ But of late, we conjecture that the condition last stated would not be regarded as a very invincible obstacle. In the case of Fairman's appeal,¹⁵ it was decided by the court, *Butler, J.*, that tombstones are properly a part of the funeral expenses, and, under the advice of the probate court, a reasonable sum may be used by the personal representative for that purpose, even where the estate is insolvent. In the absence of any statutory provision upon the subject, the propriety of obtaining them, and the amount to be expended, may properly be left to the Court of Probate.

11. But it has been decided that where one, of his own motion, buries the deceased, and then sues the personal representative, without giving him notice of the expenditures, he cannot
 * 247 recover.¹⁶ * But generally funeral expenses are a charge upon the assets in the hands of the executor or administra-

expenses of the funeral may be brought against the administrator in his representative capacity, and judgment may be *de bonis propriis*. *Campfield v. Ely*, 1 Green, 150. See *Patterson v. Patterson*, 59 N. Y. 574.

¹² *Jennison v. Hapgood*, 10 Pick. 77.

¹³ *Wood's Estate*, 1 Ashmead, 314.

¹⁴ 6 Paige, 277.

¹⁵ 30 Conn. 205. In *Donald v. McWhorter*, 44 Miss. 124, it is said expenses of funeral may embrace carriage hire, vaults, and tombstones.

¹⁶ *Gregory v. Hooker*, 1 Hawks, 394.

tor, independently of any promise by them, and if proper to the estate and degree of the deceased, must be preferred to all other debts.¹⁷ Funeral expenses are regulated by the circumstances of the deceased and the usages of the country, and are first to be paid;¹⁸ and to that extent constitute a claim or lien upon the estate superior to all other demands.

12. And it has been held that where one, before the granting of letters of administration, paid the reasonably necessary expenses of the funeral of the deceased, he was entitled to be reimbursed out of the assets coming to the hands of the administrator, when appointed; and that the administrator, who refused to make compensation under such circumstances, after request, was personally responsible to the party who had paid them.¹⁹

13. A demand for mourning furnished the widow and family of a deceased person, by direction of the executor, cannot be charged by him against the estate, as part of the funeral expenses.²⁰ And where the heir-at-law had voluntarily paid the funeral expenses of the intestate, the court, *Stuart*, Vice-Chancellor, refused to allow the amount to be refunded out of the personalty. The learned judge said, "The plaintiff, in paying the funeral expenses, did an act of bounty, and he cannot recall it."²¹

14. Where the administrator contracted with a manufacturer for suitable gravestones to be placed at the grave of the deceased, and there was sufficient assets applicable to that purpose, it was held the manufacturer might recover of the administrator *de bonis non*, into whose hands the assets came.²² It was also considered

¹⁷ *Parker v. Lewis*, 2 Dev. 21.

¹⁸ *Palmer v. Stephens*, R. M. Charlton, 56.

¹⁹ *Rappelyea v. Russell*, 2 Daly, C. P. 214. But in *France's* and *Nesbit's* Appeals, 75 Penn. St. 220, it was decided, where the widow paid the expense of medical attendance, funeral, and tombstone, she could only recover of the estate for the expense of the funeral, since there was no necessity of any one volunteering his agency as to the others, and it must therefore be regarded as merely a voluntary payment. And in *Foley v. Bushway*, 6 Chicago Legal News, 352, the Supreme Court of Illinois held that the widow, as such, she not being the personal representative, had no power to bind the estate of her husband for the erection of a monument over his grave.

²⁰ *Johnson v. Baker*, 2 Car. & P. 207.

²¹ *Coleby v. Coleby*, 12 Jur. N. S. 496.

²² *Ferrin v. Myrick*, 53 Barb. 76. This case is reversed in the Court of Appeals, 41 N. Y. 315, professedly upon the ground that, although the con-

* 248 by the * court, that, under the New York Code, the first administrator, who made the contract, might have been joined in the suit, on the ground of his personal responsibility under the contract, and judgment be rendered against the former *de bonis propriis*, and execution issue accordingly and against the last administrator *de bonis decedentis*, upon which the execution would issue for the purpose of reimbursing the first administrator what he should be compelled to pay out of his own estate, or, in default of payment by him, for the benefit of the plaintiff in the action.²²

tract was a valid one, and binding upon the assets of the estate in the hands of the administrator, or for his indemnity, no action could be maintained except against the administrator making the contract, who should have charged the same in his account of disbursements. Such a result, although technically right upon the strict construction of the New York Code, is surely one very much to be regretted, upon general grounds, inasmuch as it gives the appearance of refusing redress for an obviously just claim, and one confessedly entitled to preference above all others. And as the remedy seems to have been regarded as at least entitled to fair consideration, inasmuch as it was adopted by the majority of the Supreme Court, and a large minority of the Court of Appeals, so that the judges seem to have been, first and last, nearly equally divided upon the point, it surely was not a little surprising that the construction of the court below in favor of the remedy did not prevail in the Court of Appeals. We say this with more confidence, since the course of modern judicial constructions has become so almost universally in favor of advancing remedies, where there is any fair ground of doing so. It seems to us, to say the least, that the first decision is the better law, and we therefore continue it as the text of our book upon this point.

* CHAPTER IX.

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THE PAYMENT OF DEBTS, AND THE ORDER IN WHICH IT SHALL
BE DONE.

SECTION I.

EXPENSES OF LAST SICKNESS, FUNERAL, AND ADMINISTRATION.

1. These expenses are regarded as preliminary to any proper distribution among creditors.
2. But they will not embrace any expenditure for the family.
- n. 1. Extended note of the American cases on preferred debts.
3. This includes probate fees, other moneys paid out, and customary charges for service.
- n. 3. Probate fees and other charges for administration should be kept low.
4. Where the testator by will charges a particular estate with the payment of his debts, and funeral and testamentary expenses, that estate is primarily chargeable with all costs and expenses in the course of administration.
5. Where the executor or administrator pays out the assets to legatees or next of kin, and debts afterwards come to their knowledge, such assets may generally be reclaimed.

§ 36. 1. BY statute, in most of the states, the expenses of last sickness and those of the funeral are placed upon the same footing as to payment. And by long practice and construction the funeral expenses and those of administration have been placed on the same footing, both being regarded as preliminary to any distribution among creditors, in the strict sense of that term, since these expenses must be deducted in order to determine if there be properly any assets to distribute.¹

¹ The King *v.* Wade, 5 Price, 621, 627, by *Richards*, Ch. B.; 2 Wms. Exrs. 890. It has been held that the expenses of a nurse are properly embraced among those of the last sickness. *Percival v. McVoy*, Dudley, Law, 337. It is here said that no precise rule can be laid down as to the duration of the last illness, or the degree of attention to be paid, and consequent expense which may properly be incurred. See § 35, ante. Mr. Fish, in his edition of Wms. Exrs. vol. 2, p. 893, has a very extended and valuable note upon this point, which the profession will do well to consult. The preference in favor of the

* 250 * 2. It seems entirely well settled, that the expenses of the family, however well merited and indispensable, cannot be embraced among the necessary or allowable expenditures for funeral or last sickness.²

3. The expenses of administration, which are preliminary to all distribution of assets, do not extend beyond money actually paid out by the personal representative, which is generally limited to probate fees and the expenses of preserving the estate, and such moderate allowance for personal services as are established by statute or custom.³ The necessary costs of the executor in

United States extends to all debts due them, as well upon bills of exchange as those of a strictly public and official character. *United States v. Fisher*, 2 Cranch, 358. This priority does not amount to a lien upon the property of the public debtor. *United States v. Hooe*, 3 Cranch, 73, 90. For, in order to bind the personal representative, he must in some way be made aware of the existence of the debt in favor of the United States. *Marshall*, Ch. J., in *United States v. Fisher*, 2 Cranch, 358, 390. The statute secures to the surety, who pays a debt due from his insolvent principal to the United States, the same priority to which the debt was entitled before payment; but this will not extend to defeat the effect of a discharge in bankruptcy as against the surety. *Aikin v. Dunlap*, 16 Johns. 77. The priority of the United States will not override a specific lien created by the debtor in his lifetime upon property, whether accompanied by possession or not. *Conard v. Atlantic Insurance Co.*, 1 Peters, 386, 439. Nor will it affect the lien of an incorporated bank, created by its charter in favor of the bank for the security of the indebtedness of its stockholders to it. *Brent v. The Bank of Washington*, 10 Peters, 596. The federal statutes are of paramount authority to all state laws as to all matters coming within their cognizance. *United States v. Duncan*, 4 McLean, 607. The personal representative is a trustee of the estate for the debtors, and is bound first to satisfy preferred debts of which he has knowledge. *Ib.*

In a large number of the states, embracing all the New England states and some others, the order of payment of expenses and debts is, — 1. Expenses of last sickness, funeral and probate fees; 2. Taxes; 3. Debts due the State; 4. Debts due the United States; 5. All other creditors. *Gen. Stats. of Vermont*, ch. 53, § 34; *Gen. Stats. of Mass.* ch. 99, § 1; *Wilson v. Shearer*, 9 Met. 504, 507.

² *Brewster v. Brewster*, 8 Mass. 131; *Washburn v. Hale*, 10 Pick. 429. In this last case it was decided that the administrator could not charge in his administration account expenses paid in support of the intestate's widow, and that money in her hands at the decease of her husband, earned and received by her before the marriage, or given to her by her husband, must be inventoried by the administrator as part of the estate of the husband. But see ante, § 23.

³ It may not be altogether without some just reason to suggest here to

a litigation * in equity will be regarded as the primary * 251 charge upon the fund in litigation.⁴ But a provision in the will for the payment of "testamentary expenses" will not be held to embrace the costs of a suit made necessary by the will.⁵

4. Where the testator charged, by his will, one of his estates with the payment of debts, and funeral and testamentary expenses, and, in a creditor's suit, that estate together with another, not so charged, were decreed to be sold for the payment of debts and expenses, it was held that the estate so charged was primarily liable for the costs of the suit.⁶

5. As a general rule, where the executor or administrator pays over to the residuary legatee or to the next of kin, as the case may be, what he believes such party entitled to receive out of the estate, supposing all prior claims upon the estate to have been adjusted, and subsequently debts appear of which the personal representative had no knowledge, the assets so paid over may be reclaimed in order to meet such debts.⁷ But in some cases where such assets have been paid over by the personal representative without proper examination, as to whether they would be required to meet prior claims, the courts have declined to lend their aid in

those having the control of the rate of charge for the expenses of administration of the estates of deceased persons, that the advance has, for the last twenty years, in some states certainly, gone quite above the ratio of increase in regard to other expenses; and unless some low limit can be maintained, it will become impossible, as it was for many years in England, for persons of moderate means to meet the enormous cost of appealing to the judicial tribunals of the country for the regular administration of estates or of justice. This may not be regarded, in respect of ordinary litigation, as entirely without its compensatory advantages; since there is no cause for increasing litigation more sure in its operation than the reduction of its cost. But in regard to the settlement of estates in the probate court, which seems almost a necessity, both in regard to keeping up clear record proof of titles, and the relieving of all parties from what would otherwise prove a distressing source of uncertainty and perplexity, in a multitude of cases, there can be no adequately compensating advantage resulting from any considerable increase in the expense, which in the majority of cases must of necessity fall upon those poorly able to bear it. It is far better to have the officials connected permanently with the probate courts, compensated by salaries rather than fees, as is the case in many of the states, and to keep the fees at the lowest living rates. Post, § 48.

⁴ Gaunt v. Taylor, 2 Hare, 413.

⁵ Brown v. Groombridge, 4 Mad. 495.

⁶ Wilson v. Heaton, 11 Beav. 492.

⁷ Ante, Vol. II. § 29, p. 456.

* 252 enabling * him to reclaim them, treating it as a voluntary payment with full knowledge of the facts, or, what is the same in equity, full means of knowledge.⁸

SECTION II.

PREFERRED DEBTS.

1. The national courts supreme within their sphere. State courts have the general jurisdiction of the settlement of estates.
2. The personal representative must pay debts according to priority. Mode of procedure.
3. Assets, as to creditors, distributed according to the *lex rei sitæ*; as to legatees and distributees, according to law of domicile.
4. Testator cannot, by will, defeat legal preferences. Liens respected.
5. Special statutory preferences in England. Fiduciary debts preferred in Kentucky.
6. Docketed judgments take priority in New York. This will embrace decrees of the Court of Chancery and justice judgments, but not foreign judgments, or those of other states.
7. In cases of partnership, the partnership creditors have a prior claim upon the partnership effects; and the private creditors upon the effects of the separate partners.
8. The result of the decease of one of the partners; dissolution; exceptions; duty of survivors.
9. Distribution of assets of partnership and of separate partner deceased.
10. An executor cannot continue a partnership business, except by the clearest direction of the will.
11. If he accept new shares, he assumes personally the responsibility of a shareholder.

§ 37. 1. WE have already referred to some of the classes of preferred debts, under the laws of Congress, and in the different states.¹ We have there seen that the laws of Congress, as to matters within their jurisdiction, are paramount, in force and authority, to all other laws. But beyond this, the settlement of estates is exclusively within the jurisdiction and control of the state legislatures, and considerable perplexity has hitherto been found in regard to the mode of operation of United States courts upon the settlement of estates in the probate courts of the

* 253 several * states, as to matters falling within the proper jurisdiction of the former courts.²

⁸ *Donnell v. Cook*, 63 N. C. 227.

¹ *Ante*, § 36, n. 1.

² *Story, Conflict of Laws* (Redfield's ed. 1865), where we have referred to the cases upon this point in §§ 529-529 m.

2. It seems to be settled upon authority, and to result from the very nature of the provision, that the personal representative must first pay preferred debts, in the order of their preference, or he will become personally liable, and may be compelled, through his sureties by suit upon his bond, to pay such preferred debts, beyond the amount of assets remaining in his hands, if he have paid debts of an inferior grade.³ But as he is only liable to pay preferred debts which are made known to him,⁴ he will not, ordinarily, be likely to err in this particular, except through gross ignorance of duty, or wilful neglect. As these questions never arise except in regard to insolvent estates, there will be little chance for the personal representative to fail in the discharge of his duty in that respect, since in the case of insolvent estates, in most of the states, all the debts are reported to the probate court by commissioners, and there appear of record before the duty to pay arises. And the personal representative may obtain from the probate court an order for payment, specifying the preferences, if any, which will be his sufficient warrant for all payments.⁵

³ 2 Wms. Exrs. 891; 2 Bl. Comm. 511.

⁴ Ante, § 36, n. 1; *Hawkins v. Day*, Amb. 160, 162. The rule of requiring notice to the personal representative of the existence of preferred debts, in order to charge him with default, if he pay those of an inferior degree first, seems to have obtained at a very early day. *Harman v. Harman*, 2 Shower, 492, and cases there cited. And the same rule is recognized in more modern cases, *Sawyer v. Mercer*, 1 T. R. 690; and continually until the present time; 2 Wms. Exrs. 926, 927. But it is to be borne in mind that there is an important distinction between debts in the form of judgments and other debts, in regard to proof of notice. In regard to the former the personal representative is bound to take notice, since docketed judgments in courts of record are matters of such public notoriety, that no one will be excused from any duty in regard to them on the ground of ignorance; and, at his peril, the executor or administrator must take notice of all judgments in courts of record docketed, for the express purpose of notice, in conformity with statutory provisions. *Littleton v. Hibbins*, Cro. Eliz. 793, 4 & 5 Wm. & Mary, c. 20, in regard to docketing judgments. But if the judgment is not docketed it will be treated as a simple contract debt, and proof of actual notice to the personal representative of its existence will be of no avail. *Hall v. Tapper*, 3 B. & Ad. 655.

⁵ Gen. Stats. of Mass. ch. 99, §§ 1, 2 et seq.; 1 Bennett & Heard's Dig. 679, et seq. and cases cited. *Jackson, J.*, in *Walker v. Hill*, 17 Mass. 380. By the present statute of Vermont, Gen. Stats. ch. 53, § 1, the probate court is required to appoint commissioners to report the debts due from the estate,

* 254 * 3. A question of some difficulty has been raised, in regard to preferences, where the decedent died domiciled in a state or country where certain preferences were declared by law, but leaving his personal estate lying in a state or country where no such preferences were allowed. It has been supposed that upon principle, as an ancillary administration must be resorted to in the place where the estate lies in order to effect its administration, that no preferences could be enforced in such case.⁶ But in a somewhat recent case⁷ it was held by the present Master of the Rolls, Sir *J. Romilly*, that the personal assets of the testator must be administered according to the law of his domicile. This was a case where the testator died domiciled in Ireland, leaving personalty both in Ireland and in England. The learned judge said, that as to all the assets he must decide precisely the same as if he were sitting in a court of equity in Dublin. And in a late case before Vice-Chancellor *Kindersley*, it was said, in regard to a case similarly circumstanced, that the Irish assets should be administered according to the Irish law; and the same also as to any surplus remitted to Ireland, the place of domicile, to be there administered. But from the tenor of the remarks of the learned judge, it is to be inferred that he regarded it to be the duty of the personal representative, in every jurisdiction, so far as creditors are concerned, to distribute the assets within his control, according to the law of that jurisdiction, paying all debts, in full, if practicable, and then remit any surplus to the place of domicile, to be there disposed of among the legatees, or next of kin, in conformity with the law of that place.⁸ It is certain, we think, that the course here

in all cases, except where it shall appear there are no debts due from the estate, or where, being less than \$300 in all, it shall be assigned to the widow.

⁶ Story, Conflict of Laws, § 524.

⁷ *Wilson v. Lady Dunsany*, 18 Beavan, 293. In *Holcomb v. Phelps*, 16 Conn. 127, the rule declared is very similar to the one indicated in the last case, that the distribution of all the personal effects should be made according to the law of the place of the domicile of the decedent, and that the authority to make such distribution must be derived from the proper tribunals where the property is situated. In the last case the question arose exclusively between distributees, and not among creditors.

⁸ *Cook v. Gregson*, 2 Drewry, 286. And in a more recent case before the Master of the Rolls, *Pardo v. Bingham*, Law Rep. 6 Eq. 485, the rule sug-

indicated * is the one which prevails, to a great extent, if * 255 not universally, in the American states, as we have stated more fully elsewhere.⁹

4. It seems to be beyond question, that the testator has no power to direct his executor to pay all his debts equally, and thus defeat legal preferences.¹⁰ The order of paying debts is a matter in regard to which no testamentary power exists, that not extending beyond that of directing the particular property upon which the burden may be imposed. But as before stated,¹¹ all legal preferences are subject to any existing lien upon the property at the time of the decease of the testator or intestate, whether that lien be one created by law or by contract.¹²

5. There are many cases where special preferences are created by statute. Thus, in England, debts due the post-office, not exceeding £5; debts due from an overseer of the poor for moneys received by virtue of his office, and moneys in the hands of the deceased belonging to any Friendly Society, with some others, are preferred by special statutory provisions. We are not aware that such preferences exist in the American states to any considerable extent. It is held in Kentucky, under their statute of 1839, that the personal representative of the father, who had acted as natural guardian of his child, and in that capacity had received moneys belonging to the child, must first pay such moneys as a preferred debt.¹³

6. In some of the states docketed judgments are entitled to priority of payment.¹⁴ By this is meant, that such debts shall have priority according to the order of docketing, and not according * to the date of such judgments.¹⁵ A justice * 256

gested by Vice-Chancellor *Kindersley*, of paying debts according to the law of the place of the ancillary administrator, when paid there, was followed.

⁹ Ante, § 2, and notes.

¹⁰ *Turner v. Cox*, 8 Moo. P. C. C. 288.

¹¹ Ante, § 36, n. 1.

¹² *Turwin v. Gibson*, 3 Atk. 720; *Lloyd v. Mason*, 4 Hare, 132. By the English statutes the preferences in favor of the Crown are limited to debts of record and by specialty, but this limitation, as we have before stated, does not obtain in regard to debts due the United States, and, we presume, not to any considerable extent, as to debts due the several states. The preferences, in the American states, generally, but not always, are irrespective of the form of the debt.

¹³ *Curle v. Curle*, 9 B. Monr. 309.

¹⁴ 2 Rev. Stats. N. Y. 87.

¹⁵ *Ainslie v. Radcliff*, 7 Paige, 439.

judgment, if docketed, will be entitled to preference.¹⁶ But a foreign judgment, or one recovered in another state, cannot be docketed within the meaning of the statute, and is not entitled to preference in payment.¹⁷ But a judgment against an executor or administrator is not entitled to preference in payment, but will take the same order as the cause of action.¹⁸ Decrees in the courts of equity stand on the same footing as judgments in the courts of law.¹⁹ But a mere interlocutory judgment, as one to account, will not secure a priority, it must be a final judgment for payment of a defined sum.²⁰ So, too, the ordinary decree of foreclosure is not a judgment for payment, but only for foreclosure, and will not give priority.²¹

7. This may be a proper place to mention one class of preferences growing out of mercantile partnerships. The funds of the partnership are regarded in equity, as first pledged by the respective partners, for the payment of the partnership debts. And in the administration of partnership effects, either at law, or in equity, and equally in bankruptcy or insolvency, no portion of them can be applied to the payment of the individual debts of either of the partners until all the partnership debts are paid.²² And the converse of this proposition is held in most of the American states; that the private and personal creditors of the separate partners have the same preference in regard to the payment of their debts out of the separate estate of such partners, that the partnership creditors have in regard to the partnership effects.²³ But it has been questioned, whether the creditors of the separate partners can, upon equitable principles, maintain any such priority.²⁴ But the rule first stated seems now to be pretty generally acquiesced in by the courts.

¹⁶ *Stevenson v. Weissner*, 1 Bradf. Sur. Rep. 343.

¹⁷ *Brown v. Public Admr.*, 2 Bradf. Sur. Rep. 103.

¹⁸ *Parker v. Gainer*, 17 Wendell, 559; 2 Wms. Exrs. 900. By the present English statute (1 Vict. c. 110, § 19), no judgment-lien can be created until special notice of such claim shall be filed with the Master of the Court of Common Pleas at Westminster, and all docketing of judgments is there abrogated in future.

¹⁹ *Shafto v. Powel*, 3 Lev. 355.

²⁰ *Smith v. Eyles*, 2 Atk. 385.

²¹ *Wilson v. Lady Dunsany*, 18 Beav. 293, 299.

²² *Washburn v. Bank of Bellows Falls*, 19 Vt. 278, and numerous cases cited.

²³ *Jewett v. Phillips*, 5 Allen, 150.

²⁴ *Bardwell v. Perry*, 19 Vt. 292.

* 8. Where one of the partners deceases during the con- * 257
tinuance of the term of partnership, that determines it,
unless there is some special provision in the articles or by the
will of one of the members for its extension beyond the life of
the members, by means of introducing the personal representative
of the deceased member, in which case, if the creditors of the firm
do not interfere, as they may, if there is any claim of its insol-
vency, it will go on after the decease of one or more members,
according to the provision of the articles, the same as before such
decease.²⁵ But in the ordinary case, where there is no special
provision for the continuance of the business beyond the life of all
the members, the effects of the firm, upon the decease of one of its
members, vest in the survivor or survivors, and it becomes their
duty, at once, or as soon as prudently may be, to settle the entire
transaction and determine the exact balance, if any, due the
deceased member, and this is all that the personal representative
of such deceased member can claim, and no other interference with
the effects of the partnership is justified on his part.²⁶ But the
executor is exempt from being joined with the surviving partners
in any suit for recovering the partnership debts, and the estate can
only be made responsible for its proportion of any deficiency in
the assets to meet all the liabilities of the firm, and this must be
done by proceeding in equity. (a)

9. If the effects of the partnership fail to meet all the partner-
ship debts, the partnership creditors will have, as before stated, no
claim upon the private effects of the deceased partner in the hands
of his personal representative, until all the private debts of such
partner are paid.²⁷ Then the partnership creditors may claim
payment in full, or pro ratâ, according to the extent of such
effects of the partner over and above the payment of his private
debts.²⁸

10. It seems scarcely needful to say here that the executor can
have no justification for continuing the business of a partnership,
unless by the most unequivocal direction of the will, and then

²⁵ Story Part. § 319 a; *Burwell v. Mandeville*, 2 How. U. S. 560.

²⁶ *Marlett v. Jackman*, 3 Allen, 287.

(a) *Richter v. Poppenhausen*, 42 N. Y. 373.

²⁷ *Pitkin v. Pitkin*, 7 Conn. 307; *Ex parte Garland*, 10 Vesey, 110, 121, 122.

²⁸ *Parsons on Part.* 447-450, and cases cited.

only where the estate is clearly solvent.²⁹ There are some cases of this character where the executor has acted in good faith, and from an apparent necessity, in continuing the business of a partnership after the death of the testator, as to complete a contract subsisting at the time of the decease of the testator, or to

* 258 secure * investments already made, that the courts have not visited any unexpected losses thereby accruing upon the executor.³⁰

11. An executor, who accepts new shares in a company offered in consequence of those held by his testator, assumes, personally, all the responsibilities attaching to the position of shareholder by accepting new shares, and cannot indemnify himself out of the estate for any loss accruing in consequence.³¹

SECTION III.

THE PAYMENT OF DEBTS GENERALLY.

1. No distinction made, in America, between specialties and simple contract debts.
2. Voluntary bond or covenant postponed to creditors. But a voluntary settlement upon wife and children may create a valid debt.
3. Breaches of trust treated as merely simple contract debts.
4. All debts treated as due at the decease of the testator or intestate.
5. Contingent undertakings are not to be regarded as debts, until the contingency transpires, but they should be provided for before payment of legacies.
6. Indemnities regarded as debts, after breach of the condition.
7. All estates here are settled, either as solvent or insolvent.
 - I. Solvent estates or those so treated must pay all creditors.
 1. In such cases the representative may pay debts in any order he chooses, and may retain the amount due himself. How his right contested.
 2. Actions against the personal representative suspended. Notice to present claims. Representation of insolvency. Limitation of actions.
 3. Power of the personal representative to compromise debts, &c., or submit to arbitration.
 - II. All doubtful estates settled as insolvent.
 1. Most estates settled in this form. Report of commissioners accepted by court creates final judgment from which appeal lies.

²⁹ *Kirkman v. Booth*, 11 Beav. 280.

³⁰ *Garrett v. Noble*, 6 Sim. 504; *Collinson v. Lister*, 20 Beav. 356, 365, 366. But in this latter case it was held, that where the executor was guilty of negligence or undue confidence, he could not visit his losses upon the estate.

³¹ *Fearnside & Dean's Case*, Law Rep. 1 Ch. App. 231.

2. Otherwise, it becomes conclusive as to debts due from the estate. Right to recover excess of payment. Statute of Limitations.
3. This need not embrace expenses of funeral and last sickness.
4. The court should declare a dividend on debts unless estate ample; or this may be deferred till after settlement of first administration account.
5. The creditors must obtain a final decree in their favor, in the probate court, and may then sue the administration bond.
- * 6. The probate court is the exclusive forum for determining all * 259 questions affecting faithful administration.
7. A final decree of balance due on the account of administrator may be regarded as equivalent to a decree in favor of the creditors. Such decree may be rendered on failure of appearance.
- 8 and n. 26. But the bond for faithful administration cannot be sued in the common-law courts, until all breaches complained of have been established by decree of the probate court.
9. The personal representative may present claims, in his own favor, before the commissioners, or on rendering his administration account.
10. The personal representative secure in disposing of assets according to decree of the court. But not if he act without such decree.
11. But he cannot retain from a legacy the indebtedness of the legatee. Query?
12. The bond for faithful administration may be put in suit by any one showing a *prima facie* breach.
13. Giving a bond for payment of debts and legacies conclusive admission of assets for that purpose.
14. Executors, &c., bound to apply the assets as the law requires; not merely to keep them safe.
15. If the executor give bonds where none are required, the surety is liable to the full extent.
16. The personal representative may retain any sum due him, either in law or equity, after proper allowance.
17. Courts of probate have no such equitable powers as will enable them to make effective decrees to set off mutual judgments.

§ 38. 1. As there is no distinction made in most of the American states, in regard to the order of payment, between specialty and simple contract debts, most that is found in the English books upon this subject may be omitted here.

2. It may be stated, as a general rule, that a bond, or covenant, merely voluntary,¹ shall be postponed till after the payment of all *bonâ fide* debts, owing for valuable considerations; but such bond or covenant, if not in the way of the payment of the creditors, should be paid by the personal representative, in preference to

¹ Post, § 42, where it will appear that a simple contract, in the form of a note or bill, or indeed, in any other form, will not constitute a good *donatio mortis causâ*, not being upon consideration, and not implying a good consideration like a contract under seal.

legacies,² since even a voluntary bond or covenant creates a binding obligation, during the life of the testator, but his will only takes effect at his decease. But a bond and mortgage to secure the payment of money expressed to have been borrowed by the husband from the trustees of a settlement, made, during coverture, upon the wife and children, is not to be regarded as merely voluntary,³ and it will make no difference whether the money

* 260 was paid * over to the trustees by the husband and then borrowed of them, or a bond given expressive of such facts, without the form of paying over the money.⁴

3. Breaches of trust are ordinarily regarded as simple contract debts, and are entitled to payment as such,⁵ unless the debt and breach of trust both arise from the violation of an obligation under seal,⁶ where such debts are entitled to preference.

4. It has been often held, that it will make no difference, in regard to the duty of the personal representative to pay debts, whether they are due presently or only in future. All the actual indebtedness of the deceased is to be liquidated, as of the day of the death of the debtor, except only that such debts as carry interest by the terms of the contract, will be entitled to demand interest, until there has been unreasonable delay in making payment, and then the interest for the damages caused by the delay of the executor or administrator should be borne by him, unless it has been saved to the estate, being in the nature of a *devastavit*. (*a*)

5. Contingent debts, however, cannot be recognized by the personal representative as imposing any duty of payment, until after the contingency transpires, and they become absolute debts.⁷ This applies in general to contracts for indemnity.⁸ And all future pay-

² *Jones v. Powell*, 1 Eq. Cas. Ab. 84, pl. 2; *Cray v. Rooke*, Cas. temp. Talb. 153; *Watson v. Parker*, 6 Beavan, 283; *Cox v. Barnard*, 8 Hare, 310.

³ *Tanner v. Byne*, 1 Sim. 160.

⁴ By Sir *John Leach*, V. C., in *Tanner v. Byne*, 1 Sim. 160, 169.

⁵ *Vernon v. Vawdry*, 2 Atk. 119.

⁶ *Gifford v. Manley*, Cas. temp. Talb. 109; *Benson v. Benson*, 1 P. Wms. 130.

(*a*) In *Gray v. Harris*, 43 Miss. 421, it was held that where a debt was made payable in Confederate money, the amount of the debt was to be estimated at the value of such money when the debt was created, and not when it fell due.

⁷ *Harrison's Case*, 5 Co. 28 b; *Philips v. Echard*, Cro. Jac. 8.

⁸ *Hawkins v. Day*, Amb. 160. But it is here said that legacies should not

ments upon annuities are regarded as contingent, and not to be recognized by the personal representative, until they become absolute.⁹ But the same rule does not apply to the payment of legacies before securing the future and contingent payments upon annuities, and security is sometimes required of the legatees, in order to insure future payments, as they may fall due, upon the annuity; but no security can, in such case, be demanded of a legatee who is also an executor.¹⁰

6. But bonds of indemnity, after a breach of the condition,* although the obligee have not paid the debt secured by the indemnity, will, it has been held, be regarded as specialty debts, to the full amount of the penalty.¹¹ The more reasonable view would seem to be to regard the indemnity as creating a debt to the extent of the liability indemnified against, after the technical breach of the condition, either in favor of the original obligee or of the sureties after payment of the amount. (b)

7. In regard to the right of election by the personal representative among creditors of equal degree, and of retainer upon his own debt in preference to other debtors of equal degree, both of which exist in the English practice, we cannot find that any such rule has ever received much countenance in the American states. Here, as before intimated, all estates are divided into two classes, as to the mode of settlement: 1. Those that are regarded as solvent; 2. Those which are represented and treated as insolvent, in regard to the mode of settlement.

I. As to solvent estates. Here the personal representative is presumed to have assets sufficient for the payment of all debts due from the estate, and he must in general pay them all in full, it being his duty to represent all estates, in regard to which there is any question, as insolvent, and thus have them settled in that form.¹²

be paid until some security is given by the legatee to refund if the conditional obligation should become absolute. See also *Collins v. Crouch*, 13 Q. B. 542.

⁹ *Read v. Blunt*, 5 Sim. 567. The commissioners can only allow present liabilities susceptible of definite estimation. *Bacon v. Thorp*, 27 Conn. 251.

¹⁰ *Slanning v. Style*, 3 P. Wms. 334.

¹¹ *Cox v. Joseph*, 5 T. R. 307; *Musson v. May*, 3 V. & B. 194.

(b) And the judge of probate will refer the claim to referees, where decision will be final, unless set aside for good cause. *McLaughlin v. Newton*, 53 N. H. 531.

¹² *Bates v. Kimball*, 1 Aik. (Vt.) 95; *Blodget v. Collard's Admr.*, 7 Vt. 9.

1. In this class of cases, as the personal representative is bound to pay all the debts due from the deceased, it is at his own election in what order he will meet them; and he may, by consequence, retain upon any debt due himself. And as the other creditors are all to be paid in full, they have no occasion to call in question the existence or amount of any debt upon which the personal representative may claim to retain.¹⁸ If any question of that kind should be made by any one, it will properly arise upon the final account in the probate court, when the personal representative shall seek the sanction of that court in regard to the final disposition of all the assets in his hands belonging to the estate. It will be proper then for the legatees or distributees, or those entitled to the residue, to raise any proper question in regard to all sums proposed to be retained by the personal representative upon debts due himself, either in his personal, or in any representative capacity as executor, administrator, guardian, or trustee of another. (c)

* 262 * 2. In many of the states, all actions against the personal representative are suspended for a term, as one year, or more, or less; and in the mean time he is required to give notice of his appointment, and for claims against the estate to be presented to him. And at the end of this term the personal representative is allowed to elect whether he will represent the estate as insolvent, or proceed to settle it as solvent. If he should proceed to settle it in the latter mode, not having received notice of sufficient debts to justify him in making a representation of insolvency, and afterwards debts should be presented whereby the assets in his hands should be more than exhausted, he may plead any payments *bonâ fide* made by him before knowledge of such last claims, in bar of any claim against him beyond the amount of assets remaining in his hands. And the creditors remaining unpaid at the time the deficiency of assets is thus discovered, will only recover a ratable amount of the assets remaining unadministered in pro-

¹⁸ *Kirksey v. Kirksey*, 41 Ala. 626; *Glenn v. Glenn*, id. 571. But where the funds at his disposal will not pay the debts in full, the executor can only retain ratably upon his own debt. *Bain v. Sadler*, L. R. 12 Eq. 570. And the personal representative may not only retain upon liquidated debts, but upon all legal debts, liquidated or not, and the right of retainer extends also to equitable debts, which may be ascertained at law. *Mellish*, L. J., in *Morris v. Morris*, L. R. 10 Ch. App. 68.

(c) *Ramsour v. Thompson*, 65 N. C. 628.

portion to their debts, and the matter will be adjusted by a representation of insolvency, where there remain more than one of the creditors unpaid.¹⁴ There is generally some short limitation fixed * by statute in the American states as to all actions * 263 against personal representatives of deceased persons by their creditors.¹⁵

3. The personal representative has power to compromise claims

¹⁴ Gen. Stats. Mass. ch. 97, §§ 1, 16, 17, 18, 19. After a representation and decree of insolvency, all suits against the estate, even where property has been attached, are to be discontinued, and brought before the commissioners. *Edes v. Durkee*, 8 N. H. 460. If an administrator suffers judgment to be rendered against him upon any claim before representing the estate insolvent, he must pay the same in full, without regard to the assets of the deceased. *Newcomb v. Goss*, 1 Met. 333. But if he pay a claim in full under the belief that the estate was solvent, and it afterwards comes to be settled as an insolvent estate, he may recover back the difference between the amount paid and the dividend declared. *Bliss v. Lee*, 17 Pick. 83. But he cannot, in such case, recover any portion of the amount paid from a surety of the testator who was a joint promisor with him, the debt not having been paid at the surety's request, either express or implied. *Paine v. Drury*, 19 Pick. 400. The personal representative will, after giving the statutory notice to creditors and the expiration of the time for presenting claims against the estate, be justified in settling the estate and distributing the assets, upon the basis of those claims presented being the only ones to be made, and any disposition he may in this way make of the assets in his hands will bind all the creditors. *Erwin v. Toper*, 43 N. Y. 521. And his sureties will not be held responsible for the payment of a judgment recovered against him by default upon a claim not presented to him within the time limited by the statute for that purpose. *Robinson, Judge of Probate, v. Hodge*, 117 Mass. 222; citing *Dawes v. Shed*, 15 Mass. 6.

Where the same person is the personal representative both of the creditor and debtor, it is his duty, having sufficient assets of the debtor, to see the debt paid the estate of the creditor. *Fox v. Garrett*, 6 Jur. N. S. 208. But where the personal representative has advanced money to pay debts in full, in the mistaken belief that the assets will be adequate, he is entitled to be fully reimbursed before any of the debts of the estate are paid. *Spackman v. Holbrook*, 6 Jur. N. S. 881; s. c. 2 Giff. 198. But ordinarily, a personal representative who volunteers to pay debts with his own money, is regarded as standing only in the place of the debtor, and entitled to no more favor. *Lucas v. Williams*, 10 W. R. 677.

¹⁵ Post, § 39, n. (a), and cases cited. In Wisconsin it is held, that a creditor not aware of the appointment of commissioners to receive the claims against an estate settled in the insolvent form is not barred by reason of his omission to present the same, provided he bring suit thereon within one year from the decease of the debtor, as required by statute. *Boyce v. Foote*, 19 Wisc. 199.

against the estate; and one of several executors may settle an account with a person accountable to the estate, and in the absence of fraud the settlement will be binding upon the co-executors, although dissenting.¹⁶ And the personal representative of an estate not represented insolvent may also submit any disputable claims against the estate to arbitration, as well as compound them by agreement, since the latter power embraces the former. But in regard to insolvent estates, the statutes in many of the American states require the approval of the Court of Probate, in order to refer claims to arbitration.¹⁷

II. In regard to the settlement of estates as insolvent, the statutes, in those states where provisions exist for these different modes of settling estates, generally provide for a representation to the probate court in regard to the matter of solvency, and the court will, in all cases of reasonable doubt, allow the estate to be so settled. We have before incidentally referred to the manner of settling estates in the insolvent form in the American states.¹⁸

1. It may be proper to state further, that most of the machinery of the probate court, in the American states, is constructed more or less with reference to the contingency of settling estates in the insolvent form, which, in the great majority of cases, will be the only appropriate mode. The commissioners appointed to report the claims against the estate act as the appointees and servants of the probate court, and their report is subject to be set aside by the court, and any matter recommitted, or qualified, by the final * 264 adjudication * of the court.¹⁹ And the final decree of the

¹⁶ *Smith v. Everett*, 27 Beavan, 446. But this he cannot do, if he be interested in the claim directly or indirectly. *Stott v. Lord*, 8 Jur. n. s. 249.

¹⁷ *Batchelder v. Hanson*, 2 Aikens, 319; Mass. Gen. Stats. ch. 99, § 11. The subject of compounding claims against the estates of deceased persons by personal representatives, by arbitration or otherwise, is now regulated by statute in England. 23 & 24 Vict. ch. 145, § 30.

¹⁸ Ante, § 37, pl. 2.

¹⁹ *Hodges, Exr., v. Thacher*, 23 Vt. 455; *Peck v. Sturges*, 11 Conn. 420; *Adarene v. Marlow*, 33 Vt. 558. And where some of the claims allowed by the commissioners are abandoned and some are paid by other persons, it is competent for the probate court to correct the list of claims according to existing facts, and if the assets are sufficient to pay the whole amount remaining due, to add interest to the allowance of the commissioners from the date. *Williams v. American Bank*, 4 Met. 317. When the creditor holds security for part of his debt by way of pledge of personal property, he must dispose of the pledge and apply the same, and can only claim an allowance for the balance

probate court accepting the report of the commissioners is the earliest adjudication from which an appeal lies.¹⁹ The order of the probate court renewing the commission for allowing claims against an estate, made within the limits prescribed by the statute, is strictly interlocutory and admits of no appeal, for the revision of the order, until after the coming in of the report and its final acceptance by the court. (*d*) And the same rule applies to any order of the probate court, affecting the reports of commissioners in that court, until the final order accepting and establishing such reports, when an appeal lies to the court for revision. All prior orders of the probate court are merely interlocutory. (*e*)

2. After the report of the commissioners is established and becomes matter of record in the probate court, it is no more subject to be contradicted or qualified, except by appeal, or new trial and rehearing, than any other judgment of a court of record.²⁰ It then

due beyond the amount of the security. *Middlesex Bank v. Minot*, 4 Met. 325. In Mississippi, claims allowed by commissioners, and the acceptance and establishment of the report of the commissioners by decree of the probate court, are conclusively settled, and the matter cannot, for any cause, be opened for further hearing at a subsequent term. *Herring v. Wellons*, 5 Sm. & M. 354; *Chewning v. Peck*, 6 How. (Miss.) 524. All estates in Vermont are settled as insolvent. *Bank of Orange Co. v. Kidder*, 20 Vt. 519. All claims which survive against the estate must, where the estate is represented insolvent, be presented before the commissioners or they will be barred. This rule applies to a claim against the sheriff for the default of his deputy. *Coite v. Lynes*, 33 Conn. 109.

(*d*) *Timothy v. Farr*, 42 Vt. 43. The mode of procedure is here somewhat discussed.

(*e*) *Hodges v. Thacher*, 23 Vt. 455; *Hobart v. Herrick*, 28 Vt. 627.

²⁰ *Woods v. Pettis*, 4 Vt. 556; *Rix v. Nevins*, 26 id. 384. Hence the statement of the case of *Wells v. Gray*, 5 Dane's Ab. 272, where it was held that after a promissory note had been allowed by commissioners at its full amount, and the sum reported to, and the report accepted by the probate court, and a decree of distribution on the sum made, it is competent, in an action of debt by the creditor against the administrator to recover the same, or a dividend upon it, for the defendant to show payments upon the same made before the allowance by the commissioners, must now be regarded as of no authority. After the time limited by statute for appeal from the allowance of commissioners, or for petition for rehearing before the commissioners by extension of the time for allowance of claims by the probate court, there is no relief, even as to claims omitted to be presented by misfortune, accident, or mistake. *Peabody's Petition*, 40 N. H. 342. But a court of equity will grant relief, where the cause of action has been fraudulently concealed. *Sugar River Bank*

becomes the basis, and the only basis, of final settlement of the debts due from the estate. Those thus allowed must be paid to the extent of the assets in the hands of the personal representative, and no others, ordinarily, can be allowed. And it has

* 265 been * held, that where the personal representative, within the first year after his appointment, and under the undoubted belief that the estate is solvent, pays a claim against the estate, in full, and it subsequently appears that the estate is insolvent, and it is so declared and a dividend decreed, such representative may at once bring an action to recover the excess of such payment, above the dividend, as having been paid by mistake, and the plaintiff is not precluded from suing immediately after the dividend is declared, because there are some other assets, which may, at some future time, prove productive.²¹ In such case the statute of limitations upon the claim for the excess of payment begins to run from the time the dividend is declared,²¹ and perhaps even from the payment of the money, since the mistake, which is the basis of the recovery, occurred then, although not discovered or fully established until the decree for a pro rata distribution.

3. This will not embrace, of course, the expenses of funeral and last sickness, which, in strictness, are not required to be allowed by the commissioners, in most of the states, but are to be settled by the personal representative upon his own discretion, as claims against him, to be adjusted preliminary to any representation as to the solvency of the estate.²²

4. Unless the report of the commissioners, as compared with the amount of the property and the avails resulting from its final disposition, fully justify the executor or administrator in assuming

v. Fairbanks, 49 N. H. 131. And the creditor's residing out of the state will not save the bar. *McCullum v. Hinckley*, 9 Vt. 143; *Rix v. Nevins*, 26 id. 384.

²¹ *Richards v. Nightingale*, 9 Allen, 149.

²² *Flitner v. Hanley*, 1 Appleton, 261. This claim was for professional services as a physician during the last sickness, and had been presented to the commissioners and allowed by them, and a dividend declared upon it by the probate court without the knowledge of the creditor, and the court held that he was entitled to recover the full amount as a preferred claim. s. c. 6 *Shepley*, 270. In suits against the personal representative, in estates not represented insolvent, where the creditor recovers judgment, he will be entitled to execution for his debt de bonis testatoris, and, for the costs, to another execution de bonis propriis. *Ludwig v. Blackinton*, 11 *Shepley*, 25.

the full payment of all the debts, it will be his duty to apply to the probate court for an order or decree for the payment of such a dividend as the state of the property renders safe. And should any thing more remain, it can be applied, as far as it goes, ratably, upon the balance due the creditors at the time of the personal representative settling his final account, or the whole matter may be deferred until that time.

* 5. If the personal representative does not voluntarily * 266 proceed to pay out the assets in his hands to the creditors as fast or as fully as they deem themselves entitled to demand, they must call him to account before the probate court, and there obtain an order for the payment to them of such proportion or the whole of the sums reported in their favor by the commissioners, as the assets in his hands will warrant. And having thus obtained a final decree of distribution in their favor, they may enforce it either by action upon the bond of the executor or administrator for faithful administration, or by suit directly against the personal representative, after proper demand and reasonable time allowed in either case; but the more common course is to sue the administration bond, as that seems to be the legitimate remedy provided in such cases, and it embraces in one action all remedy, not only against the personal representatives, but his sureties also.²³

6. The probate court is the exclusive forum for the settlement in the first instance of all questions affecting faithful administration, and those questions which are involved in that inquiry cannot be drawn into any other tribunal by means of an action upon the administration bond, or in any other mode, unless by appeal from a final decree in that court.²⁴

7. It has sometimes been considered, that a final decree of the probate court, upon the executor's or administrator's account, would be equivalent to a decree of distribution among the creditors, since,

²³ *Dawes v. Swett*, 14 Mass. 105; *Newcomb v. Wing*, 3 Pick. 168; *Paine v. Moffit*, 11 Pick. 496; *Dawes v. Head*, 3 Pick. 128; *Probate Court v. Vanduzer*, 13 Vt. 135. And it is competent for the probate court, either sua sponte, or upon petition, to call upon the personal representative to render an account of his proceedings to the time of the accounting, although not final, and a decree for partial distribution may be thus made. *Reynolds v. People*, 55 Ill. 258. But such partial settlement may be contested on the final settlement. *Dement v. Arth*, 45 Miss. 388.

²⁴ *Paine v. Stone*, 10 Pick. 75; *Probate Court v. Vanduzer*, 13 Vt. 135; *Stone v. Peasley*, 28 Vt. 716.

in such accounting and decree, the personal representative of the deceased being credited with the full payment of all the debts, this must be regarded as equivalent to a decree for such payment, and should entitle the creditors to sue the administration bond, the same as if the decree had, in terms, been made formally in favor of the creditors.²⁵ And it was considered in the case last cited, that when the executor or administrator, upon citation by the creditors for that purpose, declined or failed to appear, it would be the duty of the probate court to pass a decree against him for the payment of the debts in full.

* 267 * 8. The purpose and object of the administration bond being to secure faithful administration, according to the decrees of the probate court, the breach of duty complained of, in any suit upon the bond, must appear to have been established by the final decree of that court. Hence those decisions which have recognized the right of any party complaining of mal-administration, in any particular, to put the administration bond in suit, and prove the breach complained of, by evidence *en pais*, addressed to the triers of fact in another tribunal than the probate court, proceed upon a misconception of the exclusive nature of the probate jurisdiction as to all matters affecting the settlement of estates, and the purpose of bonds taken to that court to secure the enforcement of its own decrees.²⁶

²⁵ Probate Court *v.* Vanduzer, 13 Vt. 135; Bank of Orange Co. *v.* Kidder, 20 Vt. 519. It is scarcely necessary to add what is declared in this case and in many others, that a decree of the probate court, unappealed from, making distribution of the estate, or for any other purpose, is equally conclusive with the decree of any other court, and cannot be impeached for fraud even, except by application for that purpose to the court which rendered it. *Paine v. Stone*, 10 Pick. 75; *Harlin v. Stevenson*, 30 Iowa, 371.

²⁶ Probate Court *v.* Vanduzer, 13 Vt. 135. See contra, *Warren v. Powers*, 5 Conn. 373; *Cony v. Williams*, 9 Mass. 114. In the two latter cases it seems to be considered that the mere delay to pay the debts allowed by commissioners will be a sufficient breach of the administration bond to justify any creditor putting it in suit; and that he will recover such proportion of his debt as the executor or administrator has assets to pay, after deducting all prior expenses and legal expenditures, and that this may all be determined in the first instance, by the common-law courts, in the action upon the bond, thus drawing the entire subject of the final accounting, in all cases of administration, wholly away from the probate court. We are aware that this opinion prevailed, to a considerable extent, in some portions of New England, even among the profession, until a comparatively modern day. But it will be

* 9. It is scarcely necessary to add to what we have before * 268 said, incidentally bearing upon the question, that if the personal representative has claims by way of debts against the decedent in that class of estates, which are required to be settled in the insolvent form, that there seems a manifest propriety in having them passed upon and reported by the commissioners, so that the entire indebtedness may appear upon the records of the probate court. And although such allowance will not be conclusive against the other creditors, by reason of the creditor representing also the debtor in the case, yet it will be *primâ facie* good, and unless impeached, by some proceeding in equity taken by the other creditors, expressly for that purpose, it will stand as the final allowance and judgment in his favor.²⁷ But the cases just cited, and some others,

apparent the other view is the only one at all compatible with the recognized exclusive jurisdiction of the probate courts over all matters primarily affecting the settlement of the estates of deceased persons. See *Judge of Probate v. Briggs*, 5 N. H. 66. In *Dawes v. Swett*, 14 Mass. 105, it is decided that an action will lie upon the administration bond, where the Supreme Court have adjusted the account of the administrator and ordered a balance paid over, and the same has been demanded. So under the Mass. Stat. of 1786, the heir or next of kin could not maintain an action upon the bond of the administrator for his distributive share, without first obtaining a decree for the amount in the probate court and making demand for the same. *Robbins v. Hayward*, 16 Mass. 524; *Coffin v. Jones*, 5 Pick. 61; *Paine v. Moffit*, 11 Pick. 496, 500. The general proposition of the text is maintained in *Dawes v. Head*, 3 Pick. 128; *Paine v. Stone*, 10 Pick. 75. But in an action upon the bond for the benefit of the legatee, the executor cannot, after confessing judgment for the penalty, object that the demand has not been ascertained by judgment or otherwise. *White v. Stanwood*, 4 Pick. 380. Any question of fraud in the settlement of the administration account cannot be tried in the action upon the bond, but only by petition for rehearing before the probate court. *Paine v. Stone*, 10 Pick. 75. See also *Jenison v. Hapgood*, 7 Pick. 1. See also *Ordinary v. Cooley*, 1 Vroom, 271, where it is said that the general provision in the condition of a bond given by the personal representative for faithful administration, and that he will pay over to the persons entitled thereto all the goods, chattels, effects, and credits of the deceased, &c., will not extend to creditors. A *pro ratâ* dividend decreed by the Orphans' Court.

²⁷ *Adams v. Adams*, 22 Vt. 50. But if the claim in favor of the personal representative be presented in his account of administration for the first time, special notice of the nature of such claim should be given in the publication of notice to all persons objecting to the allowance of the account; and if the matter is referred by the Court of Probate, the referee should also give notice of the time and place of hearing, to give opportunity for objections. *Abbe v. Norcott*, 8 N. H. 51. But if the claim be allowed by the commis-

probably, show that the personal representative is not required to present his own claims against the estate before the commissioners, which is, in strictness, instituting proceedings against the estate represented by himself. He may therefore defer presenting

* 269 his own claims * until he renders his account of administration before the probate court, when that court will take such order as to the mode of trial and the nature of the proof, as it may deem expedient.

10. The personal representative who brings all the facts before the court, and disposes of the assets according to the decree of the court, is fully protected against all future claims on the part of creditors or other claimants against the estate. The only remedy of all such claimants is against the legatees and others to whom the estate has been distributed.²⁸ But where the personal representative, upon his own responsibility and without waiting for a final decision upon the validity of a claim made against the estate, assumes to decide it invalid, and pays over the assets in his hands to legatees or distributees, and the claim is ultimately upheld by the courts, such representative must pay it, without regard to his having acted in good faith in disposing of the assets. He is bound to make a legal disposition of them, and his good faith is of no importance. (f)

11. The executor has no power to retain, from a legacy due from the estate, the amount of a promissory note given him by the legatee for a debt due the estate from a third person, and which the executor holds as an indemnity.²⁹

sioners and reported among the debts due against the estate, this will form the basis of an appeal on the part of those interested in the estate. *Burns v. Keas*, 20 Iowa, 16. And by parity of reason, if no appeal is taken, the allowance will become conclusive, and can only be impeached, on the part of the personal representative, on the ground of fraud or injustice. But in *Shomo v. Bissell*, 20 Iowa, 68, it is said, that very strong equitable circumstances must be alleged to induce the probate court to allow a claim in favor of any one who had been aware of the decease of his debtor, for six years, and where the estate had been settled and the final account of the personal representative filed.

²⁸ *Bennett v. Lytton*, 2 J. & H. 155; *Caldwell v. Lockridge*, 9 Mo. 358; *Murray v. Roberts*, 48 id. 307.

(f) *Taylor v. Taylor*, 18 W. R. 1102; s. c. Law Rep. 10 Eq. 477; *Jefferys v. Jefferys*, 19 W. R. 464.

²⁹ *Smee v. Baines*, 7 Jur. N. S. 902; s. c. 29 Beav. 661. See 2 Wills, 483.

12. The bond for faithful administration is always handed over for suit in the common-law courts, upon the party showing a *prima facie* case of breach and the apparent responsibility of the signers.³⁰ In the case of estates not represented insolvent, no formal decree against the personal representative will be made in the probate court, and all that any creditor will be required to show, in order to entitle him to prosecute the bond, will be to make out a *prima facie* case of neglect of duty, which is ordinarily done by showing a judgment for his debt against the assets in the hands of the personal representative, and a demand of payment and refusal.³¹

13. The executor's bond under the Massachusetts statute to pay debts and legacies, whereby he is excused from filing an inventory, is a conclusive admission of sufficient assets for that purpose, in a suit thereon in favor of any creditor or legatee.³²

14. It is no excuse for the administrator to show that he has not actually squandered the assets in his hands, when sued for not paying debts. His omission to pay debts after the expiration of the time appointed therefor, he having sufficient assets, is a breach of his bond.³³

15. It seems that although the testator in his will expressly direct * that no bonds be required of his executors, * 270 yet if they give bonds with surety, he will be held responsible for any default of the executors, and no excuse will be heard on the part of the surety that he was fraudulently induced by the principal to execute the bond, or on the ground of any equities between the surety and his principal.³⁴

16. There is no question, as before stated, (*g*) the personal representative may retain, out of the estate in his hands, all sums due him from the estate, or the proportion which the estate is able to pay all creditors, whether such due to the personal representative be of a strictly legal character, or one only cognizable in equity.

³⁰ *Sandrey v. Michell*, 3 Sw. & Tr. 25; *Baker v. Brooks*, id. 32. But under the Mass. Stat., and probably so in the other states, it must be by decree in writing. *Fay v. Rogers*, 2 Gray, 175, qualifying *Jones*, Appellant, 8 Pick. 121. In a suit on his bond for not accounting, an administrator is not entitled to contest the validity of the order of the probate court authorizing it. *Bennett v. Woodman*, 116 Mass. 218.

³¹ *Dawes v. Head*, 3 Pick. 128; *Paine v. Stone*, 10 Pick. 75.

³² *Jones v. Richardson*, 5 Met. 247; *Colwell v. Alger*, 5 Gray, 67.

³³ *Cannon v. Cooper*, 97 Mass. 784.

³⁴ *Sebastian v. Johnson*, 2 Duvall, 101.

(*g*) Ante, n. 13.

But, in either case, the amount of such claim is always to be liquidated and allowed by the proper forum.³⁵

17. Although, for many purposes connected with the settlement of estates, probate courts possess limited equity powers, it has been held that this will not extend to decreeing the set-off of mutual judgments, when the actual parties in interest are the same, but the nominal parties of record are not the same; that this power resides only in the court rendering such judgments, when they were rendered in the same court, or if not, then in a court of equity, upon proceedings for that purpose.³⁶

³⁵ *Morris v. Morris*, 23 W. R. 120.

³⁶ *Stilwell v. Carpenter*, 59 N. Y. 414.

* CHAPTER X.

* 271

REMEDIES AGAINST THE PERSONAL REPRESENTATIVE.

SECTION I.

BY ACTION IN THE COMMON-LAW COURTS.

1. Personal representative only liable to actions within the jurisdiction where appointed.
2. Remedies against executors are : 1. For the act or default of the testator ; 2. For a share in the estate.
3. Brief suggestions as to the forms of remedies against executors, &c.
4. Commonly all actions which survive in favor will survive *against* executors.
5. This rule is uniform as to actions of contract. Actions of tort form an exception.
6. Rights of action on contracts of a personal nature do not survive against executors, unless upon breaches perfected by the deceased.
- 7 and n. 12. Some covenants must be construed as strictly personal to the covenantor.
- 8 and n. 14. How far covenants for quiet enjoyment, either express or implied, will extend.
9. The contract of the party includes his personal representative, whether named or not.
10. Continuing contracts, in the nature of agency, terminated by death of principal.
11. Where the transaction is absolute and clearly defined, its obligation survives.
12. But contracts for subsistence and the like terminate by death of parties.
13. Promise, that one's executor shall pay, same as an absolute promise to pay.
14. One's representative not liable for penalty incurred. Exception.
15. No action lies against representative for escape on final process.
16. Representative not liable for *devastavit*. Exception.
17. The sheriff's personal representative liable to an action for money collected on execution.
18. Representative not liable for mesne profits, but is for use and occupation. Exception.
19. Action will not lie against representative of carrier and others for tort, but will for breach of contract.
20. Representative not liable for waste, but is for money received in consequence.
- 21 and n. 38. No defence to an action that defendant was induced to administer by plaintiff's promise not to sue.
22. Joint contractor's personal representative not liable to action at law, unless he be the last survivor.

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- * 272 * 23. But in several, or joint and several contracts, the representative is liable to a separate action.
24. The contract may, by express stipulation, bind the personal representative.
25. How far the representatives of shareholders are responsible.
26. In general, covenants bind the representative of the covenantor.
27. The responsibility of the assignee, or personal representative, discussed.
28. Only express covenants, and not those implied in law, will bind representatives.
29. The representative is liable in debt, for rent accruing after assignment.
30. If the whole rent accrue after decease of lessee, the representative is liable personally.
31. If part of the rent accrue before, and part after the decease, it can only be joined in one suit against the representative in that capacity alone.
32. The mode in which the representative may exonerate himself from responsibility.
33. If he take possession he is responsible to the extent of the benefit he might have derived.
34. It would seem that an executor or administrator is not bound by a perpetual covenant to pay rent.
- 35 and n. 64. The extent of the responsibility of representative in case of assignment.
36. Representatives bound by covenants to repair.
37. Entry of one executor will not render both liable for use and occupation.
38. Covenants in indentures of apprenticeship regarded as personal.
39. How far the husband and his representative responsible for wife's debts.
40. Conclusion from preceding.
41. If the plaintiff rely upon a new promise by the representative he should declare upon it.
42. But the promise must be express, and, it would seem, upon consideration.
43. New promise, or part payment by co-contractor, will not remove bar as to deceased one.
- n. 75. Discussion of the American cases upon the question.
44. Nor will an acknowledgment or part payment by the representative of the deceased co-contractor have any effect as to the survivor.
45. Where testator never came within the state, statute will not operate.
46. If statute begin to operate, it will continue to run unless saved by exceptions in statute.
- 46 a. Party whose rights are fraudulently kept from his knowledge not barred by the statute.
- 47 and n. 84. Set-off must be of debts in same right.
48. Plene administravit should be pleaded, or judgment will be presumptive of assets. Responsibility of personal representative. What counts joined.
49. So also that debts of prior degree have absorbed the assets.
50. The inventory *prima facie* charges the representative.
51. Where the personal representative prevails in the suit, he recovers costs.
52. So where he fails, as a general rule, he should pay costs.

§ 39. 1. It will be understood from what we have before said, that no action can be maintained against any person, as executor or administrator of another, unless he has been appointed to that

office by the proper tribunals having jurisdiction in probate matters in the state or country where the suit is instituted.¹

* 2. The remedies against the executor or administra- * 273
tor will have reference to two distinct classes of claims :

1. Those which arise from the act or default of the testator or intestate ; 2. Those which arise out of some claim to participate in the distribution of the estate. We shall attempt in the first place to give a brief view of remedies against the executor or administrator for the duties or wrongs of the testator or intestate.

3. The form of the remedy against executors and administrators is rather a matter pertaining to pleading than to the duty of such officers ; but it may not be improper to state here that in actions against executors the plaintiff is only bound to join those who have administered.² And in actions against femes covert as executors, their husbands must be joined.³ And if one of two or more joint executors die, the action must be brought against the survivors only, and will not lie against the personal representative of the deceased executor and the surviving executors jointly.⁴ Trover will not lie against an executor and others, for a conversion by them, in conjunction with the testator, since the judgment against them will not be in the same right ; in the one case it being *de bonis propriis*, and in the other *de bonis testatoris*. Strictly speaking, an action of trover does not survive against the personal representative. For if the goods form part of the estate the proper remedy is to demand them of the personal representative, and if he refuse to surrender them, he will thus render himself personally liable in trover ; and if they do not come into the estate the tort becomes a mere personal wrong which will not survive against the estate.⁵

¹ Story, *Conf. of Laws*, § 513 ; *Kerr v. Moon*, 9 Wheaton, 565 ; *Vaughan v. Northup*, 15 Pet. 1 ; *Williams v. Storrs*, 6 Johns. Ch. 353.

² *Alexander v. Mawman*, Willes, 40, 42 ; *Cabell v. Vaughan*, 1 Saund. 291, 291 m.

³ 2 Wms. Exrs. 1751.

⁴ *Ibid.*

⁵ In many of the states actions *de bonis asportatis* are made to survive against the estate of the wrong-doer, and all other actions for damages done to real or personal estate. Gen. Stat. Vermont, ch. 52, §§ 10-13. And in some of the states these actions, which survive for and against the personal representative, are so extended as to embrace almost all actions of tort, and especially those for injuries to the person or property. Gen. Stat. Mass. ch. 127, § 1. The question how far the party has any remedy against the per-

4. It will be useful here to inquire briefly what causes of action, growing out of the acts or defaults of the deceased, will survive * 274 *against* his personal representative. And, in general terms, it may be said, that for the most part the same classes of action which survive in favor of an executor or administrator will survive against him, and vice versa.⁶ But to this there are, as we shall see, some exceptions.

5. As a general rule all causes of action founded in contract, either express or implied, survive *against* the personal representative as well as in his favor. But it is laid down by *Williams*, a very accurate writer,⁷ that the rule, *actio personalis moritur cum persona*, now applies in all its strictness to actions *against* the personal representative; "and this rule still holds with respect to the person *by whom* the injury is committed; for if he dies, no action of this kind can be brought *against* his executor or administrator, though in some of these cases, such as taking away goods, &c., a remedy may be had *against* the executor in another form," citing a long list of cases.

6. There are some exceptions in regard to actions of contract surviving against executors and administrators, since contracts may be as strictly of a personal nature as torts, and when that is the case they do not survive against the executor or administrator, unless in some ~~ex~~cepted cases, where a perfected breach accrued during the life of the deceased.⁸ This exception to the gen-

sonal representative for a conversion by the deceased, is considerably discussed in *Hambly v. Trott*, 1 Cowp. 371, 373, where it is held trover will not lie in such case.

⁶ Ante, §§ 21, 25, 27.

⁷ *Wheatley v. Lane*, 1 Saund. 216 a, n. 1. Actions against surgeons or physicians for malpractice do not survive. *Vittum v. Gilman*, 48 N. H. 416.

⁸ In *Hyde v. Dean and Canons of Windsor*, Cro. Eliz. 552, 553, it is said by the court, "And a covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed by the person of the testator, which [the executor] cannot perform." The doctrine of the text was sustained by *Stubbs v. Holywell Railway*, Law Rep. 2 Exch. 311. The facts in the case last cited were that the defendants employed the plaintiff's intestate as consulting engineer for the term of fifteen months to complete certain works. The engineer was to be paid a salary of £500, in equal quarterly instalments. Before the work was finished, and while two quarterly instalments, which were due to him, were still unpaid, he died. It was held the personal representative was entitled to recover them. For although a contract, like the present, involving personal confidence, is put an

eral * rule will include contracts by authors to prepare * 275 works of any kind for the press; ⁹ contracts for the instruction of apprentices.¹⁰ And this must be eminently so in contracts to marry, so that an action could scarcely be held maintainable against the personal representative in such a case, unless the promisor had actually married another before his decease, although he might have manifested, in other modes, a determination not to fulfil the contract on his part. Where a lumber manufacturer

end to by the death of the party confided in, it is not thereby rescinded, so as to take away a right of action already vested. The exposition of the subject by Baron *Martin* seems to me exceedingly just, and worthy of repetition here. "The law upon the subject is clear and free from doubt. Suppose a man enters into a contract to do a certain piece of work for a certain sum, then if he die before he completes it, he can recover nothing, not even if before his death he had done nine-tenths of it. But suppose the contract is for the performance of a certain piece of work for a certain sum, to be paid at the rate of £50 a month, then the person employed earns £50 at the end of each successive month. It is true that if, after doing a portion of the work, he refused to do the rest, he might not be able to recover, because he could not prove that he was ready and willing to perform his part of the contract. But such a case as the present has no analogy with that of a refusal by the person employed to continue performance. The contract, no doubt, is ended by the death of *Stubbs* [the intestate], but only in this sense, that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done, — with what has been actually earned by the deceased. The contract had, it is true, an implied condition that he should live for fifteen months. But his death does not throw back his representative upon the right of recovering upon a quantum meruit only. He can recover the stipulated price, due to the deceased when he died, of the work actually executed. No vested right of action is taken away by death. The contract is at an end, but it is not rescinded, for rescission is the act of two parties, not of one. With regard to the remarks quoted from *Smith's Leading Cases*, I may say, with the greatest respect for the learned author, that some of the positions laid down by him in the note to *Cutter v. Powell*, in his *Leading Cases*, 6th ed. vol. 2, p. 1, are not, in my opinion, supported by the authorities."

⁹ *Marshall v. Broadhurst*, 1 Tyrwh. 348, by Lord *Lyndhurst*.

¹⁰ *Ante*, § 25, pl. 5. *Baxter v. Burfield*, 2 Strange, 1266. The court here place stress upon the fact that the executor is not named in the contract. There can be no question that contracts of apprenticeship may be so expressed as to bind both parties after the death of the master. But, *primâ facie*, such contracts will be regarded as personal. By Stat. 32 Geo. III. c. 57, two justices are empowered, upon certain terms, to continue the apprenticeship after the death of the master.

contracted to sell all the lumber manufactured at his mill for five years, and that the quantity should average a certain amount, in feet, per year; but not stipulating for the delivery of any precise quantity in any one year, the lumber to be paid for upon delivery; both parties having deceased during the period; in a suit to recover for lumber delivered during the life of both parties,

* 276 it was held the contract was * merely personal, and was dissolved by the death of either party and the personal representative of either party was only responsible for breaches committed during the lives of the respective intestates.¹¹

7. There are some other cases of an equivocal character, where the English courts have held the contract to bind the party, only during his life, and that no action will lie against the personal representative, not being specifically named. Thus where one sold the good-will of his business as a newsman, and covenanted thereafter not to exercise that business, and to do his utmost to transfer his custom to the assignee, it was held that this did not preclude the widow of such vendor, who was also his personal representative, and entitled to a weekly stipend for life, as part of the price of the transfer, from re-establishing the business in her own name.¹²

8. There seems to have been considerable discussion in the early cases, how far a covenant in a lease shall be considered as co-extensive with the term, or as terminating with the life of the lessor or lessee, as the case may be. In many cases it seems to have been considered that the point would depend upon whether the executor,

¹¹ *Dickinson v. Callahan*, 19 Penn. St. 227.

¹² *Cooke v. Colcraft*, 2 Wm. Bl. 856. This case is decided mainly upon the ground, that the vendor's covenant is, in terms, personal, and does not profess to bind his personal representative, but the vendee's covenant does extend the agreed payment to the personal representative of the vendor. This does not seem to us very satisfactory reasoning. We should have felt compelled to treat the continued discontinuance of the business, as the price of the weekly payment during the joint lives of the vendor and his wife and of the survivor. And Mr. Justice *Blackstone* seems to concur in the judgment, rather upon the technical ground that the covenants are independent, and the breach of one no defence to an action upon the other, than upon the general merits. A covenant on the part of the testator as lessee does not bind the executor to renew the insurance where it had expired two days before the death of the lessor; and the buildings being burned about two months after, the executor was not held liable for not having renewed the insurance. *Fry v. Fry*, 27 Beavan, 144, 146.

assignee, or heir is named in the covenant.¹³ But it seems to us that the subject is placed in its true light, and one not difficult to comprehend, in the case of *Williams v. Burrell*,¹⁴ where it was held * upon extended argument and careful considera- * 277 tion, that in regard to covenants, for the quiet enjoyment of a term, a portion of which was void, as not coming within the power of the grantor, all implied covenants of that class, that is, such as are raised solely by implication of law, in their operation, must be limited to the duration of the legal term to which they are attached ; but that, as to express covenants, whether in precise terms, or gathered by implication or inference, they will extend throughout the entire period of the contemplated term, if such was the understanding of the parties, although they might have been under some misapprehension, as to the legal duration of the granted term.

9. In short, it will make no difference in any case as to the legal effect of any contract whether executors and administrators be named or not, inasmuch as the contract of the party, whether as

¹³ 2 Wms. Exrs. 1562, and cases cited.

¹⁴ 1 C. B. 402, 430, by *Tindal*, Ch. J. : " In every case, it is always matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is more clearly expressed, and therefore more easily discovered ; in others, it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause ; in others, it is only to be made out by the comparison of different and perhaps distant parts of the same instrument. But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning, is to be entirely disregarded ; the legal effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same ; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant." The foregoing seems to us exceedingly happy as illustrative of the difference between an express contract, which is proved by specific terms and precise language, and one which is the result of deduction and inference. It shows very clearly that the only legal distinction between the two cases is in the mode of proof ; and that a covenant, or contract, is none the less an express one, because it has to be collected from shreds and patches, than if it were evidenced by the most precise and unequivocal terms ; nor can its purpose and intention be fairly less regarded by courts because it is proved in the one mode rather than the other.

promisor or promisee, includes his personal representative in every case where the contract is of a nature to be performed after the decease of the original parties.¹⁵

10. It has sometimes been made a question how far continuing contracts were terminated by the decease of one or both the parties.

In general, where contracts are in the nature of agency, and * 278 have * for their purpose, within the knowledge of both parties, the continuance of the business of one or both the parties, there will be a natural implication from the circumstances, that neither of the parties could fairly have expected the operation and continuance of the contract, after the death of one or both the parties, according to circumstances ; as it is a familiar principle of the law of agency, that the death of the principal revokes the authority of the agent.¹⁶

11. But where the transaction is limited and defined, although extending over considerable time, and the terms of the contract absolute and unconditional, the personal representative will be liable, however obvious it may be, that the parties acted upon the expectation of the continued life of both.¹⁷ Lord *Denman* here said, "The contract leaves no option to the intestate of refusing to take the slate, delivered monthly in certain quantities and at fixed prices. . . . It is like any ordinary case of goods ordered by a testator, which the executor must receive and pay for." *Coleridge, J.*, said : "If the contract had been merely to supply what the intestate might require, a different question would have arisen."

12. It will thus appear, that it is not easy to define what precise

¹⁵ *Hyde v. Skinner*, 2 P. Wms. 196, 197, by Lord *Macclesfield*, Chancellor. "The executors of every person are implied in himself, and bound without naming." See also *Frederick v. Frederick*, 1 P. Wms. 710, 721.

¹⁶ *Campanari v. Woodburn*, 15 C. B. 400 ; s. c. 28 Eng. L. & Eq. 321. And it has been held that a contract to furnish another with a carriage for use for the term of five years, is a personal contract, and that the party undertaking cannot assign the performance of the contract to another. And by parity of reason if the party to be thus furnished should decease during the term, the contract must be at an end. *Robson v. Drummond*, 2 Barn. & Ad. 303. It has been considered, that continuing guaranties for the responsibility of others are revoked by the death of the guarantor. 2 Wms. Exrs. 1604 ; *Smith, Comm. Law*, 425.

¹⁷ *Wentworth v. Cock*, 10 Ad. & Ellis, 42. It is here intimated, that if any option remained to be exercised, in order to fix the extent of the obligation, and it had not been done, at the decease of the defendant, it would become inoperative by such decease, and could not thereafter be exercised.

contracts are, or are not, of a personal nature. Contracts, for subsistence, and for medicine, and for the instruction of children and others, whether in learning and science, or in the elegant arts, or those of handicraft, and all similar contracts, must from their very nature be personal, and terminate with the life of the objects of such services or instruction. And contracts of this kind must also be, in some sense, personal, as to the party undertaking to perform such services, since their value depends, in great measure, upon the skill, judgment, and personal discretion of the party undertaking.

13. It was once attempted to be maintained that a covenant that * one's executor or personal representative should * 279 pay money or perform any other duty, would not create any debt or duty on the part of the covenantor.¹⁸ But it seems clear, both upon reason and authority, that there is no foundation for any such distinction, and that a promise or covenant, that the personal representative, or any other one shall do, or abstain from, any act, is of the same force as if the party undertook to perform the same duty personally.¹⁹

14. It is said, as a deduction from what has been already stated,²⁰ that no action will lie against the personal representative upon a penal statute, or for not attending, as a witness, after being subpoenaed and his expenses tendered. It might be otherwise, if the money was accepted, and thus became a portion of the estate in the possession of the personal representative.²¹

15. So no action can be maintained against the personal representative of the sheriff for suffering an escape of one in execution, because it is in the nature of a tort, although by statute of Westminster, &c., an action of debt lies in favor of the creditor.²² And the same rule obtains in New York, where an action of assumpsit is given by statute.²³ The personal representative of a deceased defendant in ejectment is not liable, in case, for mesne profits accruing during the pendency of the action, since that is a claim

¹⁸ *Perrot v. Austin*, Cro. Eliz. 232.

¹⁹ *Plumer v. Marchant*, 3 Burrow, 1380, by Lord *Mansfield*, Ch. J. See also *Randall v. Rigby*, 4 M. & W. 130, by *Parke*, B.; *Ex parte Tindal*, 8 Bing. 402; s. c. 1 M. & Scott, 607, by *Tindal*, Ch. J.; *Littledale*, J., and Lord *Brougham*, Chancellor, concurring.

²⁰ *Ante*, pl. 5.

²¹ 2 Wms. Exrs. 1564.

²² Stat. Westminster, 1 & 2 Rich. 2, c. 12.

²³ *The People v. Gibbs and others*, Exrs., 9 Wendell, 29.

for forcibly withholding the possession, and is in the nature of tort.²⁴

16. And, at common law, the executor or personal representative of one, who had committed a devastavit in regard to the estate of another, was not liable to an action, the act being considered in the nature of a tort. But now, remedy against personal representatives is given, in such cases, by statute.²⁵ But as we have

* 280 before * suggested, in all such cases, where the goods came in specie to the hands of the personal representative, he may be compelled to surrender them by replevin, detinue, or any proper proceeding, or to respond in damages in an action of trover, for refusing to surrender them.²⁶

17. And it was held, at an early day, that if the sheriff levy and collect money, his personal representatives are liable to an action for not paying it over to the creditor ;²⁷ notwithstanding such default is also the ground of an action for breach of official duty against the sheriff, which does not survive against his personal representative.²⁸ The soundness of this decision is recognized by Lord *Redesdale*, Chancellor, in *Adair v. Shaw*.²⁹

18. And an executor or administrator is not liable, at common law, to an action of trespass for mesne profits.³⁰ But it seems to be conceded, that the personal representative will be liable in such case, for use and occupation, up to the time of the demise laid in the ejectment.³¹ But by taking judgment in ejectment the plaintiff is estopped to deny the tort alleged in his declaration, and is thus precluded from recovery, as for use and occupation, of the personal

²⁴ *Bard v. Nevin*, 9 Watts, 328.

²⁵ 30 Car. 2, ch. 7, and 4 & 5 Wm. & M. ch. 34, § 12. See also *Wheatley v. Lane*, 1 Saund. 216, 219 d. After the remainder of the decedent's estate is in the hands of the administrator de bonis non, no right of action remains against the deceased administrator upon a claim against such estate. *Little v. Walton*, 23 Penn. St. 164.

²⁶ *Le Mason v. Dixon*, W. Jones, 173, 174 ; *Wheatley v. Lane*, 1 Saund. 216, and note ; *Newsum v. Newsum*, 1 Leigh, 86.

²⁷ *Perkinson v. Gilford*, Cro. Car. 539.

²⁸ 2 Wms. Exrs. 1566.

²⁹ 1 Sch. & Lef. 243, 265.

³⁰ *Pulteney v. Warren*, 6 Vesey, 73, 86, 87, by Lord *Eldon*, Chancellor ; ante, n. 24.

³¹ *Pulteney v. Warren*, 6 Vesey, 73, 87 ; *Turner v. Cameron's Coalbrook Co.*, 5 Exch. 932, where the general right to maintain an action for use and occupation, by waiving the trespass, is considerably discussed by *Parke*, B.

representative, for the subsequent holding.³² It is said the mere bringing of the ejectment will not preclude the party from recovering for use and occupation.³³ But in a more recent case³⁴ it was held, that the service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term, and he cannot afterwards recover for rent due or covenant broken, although there has been no judgment in ejectment.

* 19. And although an action on the case in tort will not lie * 281 against the personal representative of a common carrier, or any other artisan, or professional man, for breach of duty, an action of assumpsit will generally lie, in such cases, for the neglect to perform the implied undertaking which the law raises in the case.³⁵

20. And although no action for waste will lie, in the common-law courts, it being clearly a tort;³⁶ yet for any benefit received by the estate the personal representative may be held liable. As where the intestate had tortiously taken coal from the plaintiff's land and received money for the sale of the same, it was held the administrator might be held liable for the same, in an action for money had and received.³⁷

³² *Birch v. Wright*, 1 T. R. 378; *Bridges v. Smyth*, 5 Bing. 410.

³³ *Cobb v. Carpenter*, 2 Campb. 13, in note.

³⁴ *Jones v. Carter*, 15 M. & W. 718.

³⁵ *Wheatley v. Lane*, 1 Saund. 216, 217 c; *Lord Mansfield* in *Hambly v. Trott*, 1 Cowp. 371, 375; *Sir J. Mansfield*, Ch. J., in *Powell v. Layton*, 5 B. & P. 365, 370.

³⁶ *Greene v. Cole*, 2 Saund. 252, and note; 2 Co. Inst. 302; 2 Roll. Ab. 828, pl. 7.

³⁷ *Powell v. Rees*, 7 Ad. & Ellis, 426. By the statute 3 & 4 Wm. IV. c. 42, § 2, it is provided, that the personal representative shall be liable to an action for any wrong committed by the deceased within six months before his decease, provided the action be brought within six months after such personal representatives shall have taken upon themselves the duties of the office. The rule in regard to the responsibility of the personal representative, for the consequences of the tortious acts of the deceased, seems to be correctly laid down by *Morton, J.*, in *Wilbur v. Gilmore*, 21 Pick. 250, 252: That the responsibility attaches, whenever the property taken by the decedent was "converted to his own use, so as to become a part of his assets," citing *Mellen v. Baldwin*, 4 Mass. 480; *Cravath v. Plympton*, 13 Mass. 454; *Holmes v. Moore*, 5 Pick. 257; *Towle, Admr., v. Lovet*, 6 Mass. 394; *Hambly v. Trott*, 1 Cowp.

21. It has been decided, that it is no defence to an action for breach of covenant against an administrator, that the defendant took out administration at the request of the plaintiff, and on his promise, not under seal, that he would not attempt to charge the defendant upon the cause of action thus put in suit.³⁸

22. Upon joint contracts the right of action at law exists solely against the survivor, and a deceased co-contractor's personal representative is not liable, in any form, to an action at law.³⁹

* 282 And * where there are several joint contractors, all of whom are deceased, an action lies only against the personal representative of the last survivor.⁴⁰

23. But if the contract be several, or joint and several, the representatives of a deceased party may be sued separately, but cannot be sued jointly with the surviving parties, since the judgments will not be the same; in the one case it being *de bonis testatoris*, and in the other *de bonis propriis*.⁴¹

24. And it seems to be considered, that where the contract, in terms, professes to bind the representatives of the parties to its performance, they will be liable to a separate action, in case of the decease of one of the joint contractors, the same as if the contract had been in terms several, as well as joint. As where several persons jointly contract for a chattel, to be made or procured for the common benefit of all, and the executors, of any party dying, are to stand, by agreement, in the place of such deceased party, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part

371. Actions for fraudulent representations do not in general survive. *Leggate v. Moulton*, 115 Mass. 552; *Read v. Hatch*, 19 Pick. 47; *Cutting v. Tower*, 14 Gray, 183; *Stilman v. Hollenbeck*, 4 Allen, 391; *Cummings v. Bird*, 115 Mass. 346.

³⁸ *Harris v. Goodwyn*, 2 M. & Gr. 405, 418. It is here said by *Tindal*, Ch. J., that if the defendant was induced to take out administration by the representation of the plaintiff, that he could not bring the suit in question, that might be a ground of application for an injunction against the suit, or to the ecclesiastical courts "to recall the letters of administration."

³⁹ *Godson v. Good*, 2 Marsh. 299; s. c. 6 Taunt. 587, 594, by *Gibbs*, Ch. J.

⁴⁰ *Calder v. Rutherford*, 3 Brod. & B. 302. See also *Slater v. Wheeler*, 9 Sim. 156; *Richardson v. Horton*, 6 Beav. 185.

⁴¹ *May v. Woodward*, 1 Freem. 248; *Hall v. Huffam*, 2 Lev. 228; 2 Wms. Exrs. 1577.

of the deceased co-contractor, that his executors shall pay his proportion of the price of the article so furnished.⁴²

25. In regard to joint-stock corporations, where by the charter, or deed of settlement, it is provided that the company shall continue for a defined number of years, and that the shares of deceased proprietors shall belong to their personal representatives, but that they shall not be deemed proprietors until duly admitted, when they shall be entitled to receive dividends, it is settled, in England, that the estate, and consequently the personal representative, continue liable, until a new personal liability has been created, pursuant to the deed of settlement.⁴³

26. There is a great deal of nice learning in regard to the extent of the liability of the personal representative of a deceased lessor * or lessee, vendor or vendee, upon covenants, either * 283 express or implied, or in the form of debt, in regard to interests in land. But we could scarcely devote sufficient space, in so general a treatise, to embrace all the minute points which have thus been decided. We shall, therefore, attempt but a brief outline of the law upon these points, which will be found discussed in detail, in works devoted more exclusively to those questions. The general rule in regard to all express covenants is, that they bind the estate, and consequently the personal representative of the covenantor, the same as himself,⁴⁴ with the exceptions already noted,⁴⁵ and to the extent of the assets.

27. Covenants for quiet enjoyment not only bind the land, and consequently the assignee, or, as it is called, run with the land, but they also bind the estate of the covenantor, and damages which have accrued both before and after the decease of the covenantor may be recovered in the same action.⁴⁶ And where the tenant covenants for the payment of rent this express covenant is not released, or in any way qualified by the assignment of the term to another, even where the lessor accepts the assignee as his tenant.⁴⁷

⁴² *Prior v. Hembrow*, 8 M. & W. 873. See also *Batard v. Hawes*, 2 El. & Bl. 287, 298; *Bachelor v. Fisk*, 17 Mass. 464.

⁴³ In re Northern Coal Mining Co., 13 Beav. 133; s. c. 3 Mac. & G. 726; *Gouthwaite's Case*, id. 187; *Keene's Executors' Case*, 3 DeG., M. & G. 272; *Heward v. Wheatley*, id. 628.

⁴⁴ 2 Wms. Exrs. 1583 et seq.; *Bally v. Wells*, 3 Wils. 25, 29.

⁴⁵ Ante, pl. 6, 7, and n. 12.

⁴⁶ *Hovey v. Newton*, 11 Pick. 421.

⁴⁷ *Coghil v. Freelove*, 3 Mod. 325, 326; *Brett v. Cumberland*, Cro. Jac. 521, 522, in note to *Thursby v. Plant*, 1 Saund. 241 a.

But this rule does not apply to the executor of the assignee, who had assigned the term before his decease. For no action will lie against the assignee, except for breaches during his term, and he may exonerate himself from all further responsibility by an assignment even to a pauper.⁴⁸ And since such a course is held entirely justifiable, morally as well as legally, an executor who omits to pursue such course, after first offering to surrender to the landlord, may be held guilty of a devastavit for any loss resulting from an omission to do so.⁴⁹

28. It seems to have been settled from an early day,⁵⁰ and * 284 is * now the established rule, that no action will lie against the personal representative of the covenantor for any breach of an implied covenant, or covenant in law, unless the breach occurred in the lifetime of the covenantor. As where the tenant for life, with remainder over, demises to lessee, his executors, &c., for fifteen years, without any express covenant for quiet enjoyment, and the lessee is evicted by the remainder-man after the death of the tenant for life, but before the expiration of the fifteen years.⁵¹ It was conceded by the court, that the word "demise" in the lease bound the lessor, by implication of law, to warrant the title to the lessee, during his life, but being only an implied covenant in law, no action could be maintained against the representative of the lessor.

29. It seems now entirely well settled, that the representative of the lessee is liable, in debt for rent, as well as covenant, where the lease had been assigned by the lessee, and also where it had been assigned by the representative himself, for rent accruing after the assignment, unless the lessor had accepted the assignee for his tenant.⁵²

⁴⁸ *Taylor v. Shum*, 1 Bos. & P. 21. And it would seem by this case, that the assignee is not to be charged with fraud for making an assignment of his term, to one wholly irresponsible, and who does not even take possession under the assignment, provided the first assignee derives no benefit from the premises after the assignment, and that it is not merely colorable.

⁴⁹ *Rowley v. Adams*, 4 My. & Cr. 534.

⁵⁰ *Bragg v. Wiseman*, Brownl. 22; *Hyde v. Canons of Windsor*, Cro. Eliz. 552, 553; *Adams v. Gibney*, 6 Bing. 656, and cases cited by counsel.

⁵¹ *Adams v. Gibney*, 6 Bing. 656.

⁵² *Coghil v. Freelove*, 3 Mod. 325; *Thursby v. Plant*, 1 Saund. 237, 241 b. Sergeant *Williams'* note here shows very clearly, that what Lord *Coke* said in *Walker's Case* (3 Co. 24 a), as to its being adjudged in *Overton v. Sydhall*, to the contrary of the rule stated in the text, is without foundation.

30. It seems also, that if the whole rent accrue during the time of the representative, the lessor has his election, either to bring his action against the executor or administrator, in his representative capacity, or in his personal capacity, or, as it was formerly expressed, to bring suit in the detinet only, — that is, for detaining the amount of the indebtedness for the rent, — or in the debet and detinet both ; that is, because the representative both owes and detains the rent.⁵³

31. But if a portion of the rent accrued during the life of the lessee, and a portion of it after his decease, both claims cannot be * joined in the same declaration, unless it is brought * 285 in the detinet only, with a view to charge the executor or administrator in his representative capacity.⁵⁴

32. It seems to be settled, that the executor who enters into possession of the demised premises, will be held personally responsible for the payment of the rent, the same as an assignee, in terms.⁵⁵ But if the executor desire to relieve himself from personal responsibility, when he is sued as assignee, he cannot do so by denying the fact that he is such, this being sufficiently proved, in law, by showing him to be the executor of the lessee ; but he should allege that he is no otherwise assignee than by being executor, and that he has never entered, or taken possession of the demised premises. And he may exonerate himself from all responsibility, as executor, by pleading and showing, that the term is of no value, and that he has fully administered all assets which have come to his hands.⁵⁶

⁵³ *Jevens v. Harridge*, 1 Saund. 1, and notes and cases cited. And it is immaterial whether, in such action, in the debet and detinet, the representative be named as such or not ; for if it be alleged that he both owes and detains the rent, it will be construed as an action to charge such representative in his personal capacity. 2 Wms. Exrs. 1587, 1588 ; *Lyddall v. Dunlapp*, 1 Wils. 4, 5 ; *Caly v. Joslyn*, Aleyn, 34. But the more natural and reasonable mode will be, where it is desired to charge the representative personally, not to name his representative capacity.

⁵⁴ *Salter v. Codbold*, 3 Lev. 74 ; *Aylmer v. Hyde*, Selw. N. P. 7th Amer. ed. 623.

⁵⁵ *Buckley v. Pirk*, 1 Salk. 316, 317 ; *Tilney v. Norris*, 1 Ld. Ray. 553 ; s. c. Carth. 519. See *Wollaston v. Hakewill*, 3 Man. & Gr. 297, where the subject is very learnedly discussed, both by counsel and court.

⁵⁶ *Tindal*, Ch. J., in *Wollaston v. Hakewill*, 3 Man. & Gr. 297, 321. The executor, whether he take possession or not, is liable, to the extent of the

33. But if the term is of any value the executor is liable to that extent in his personal capacity, if he take possession. If, therefore, the use be of any value, he must confess that and plead to the remainder of the claim.⁵⁷ The executor is responsible for all the profit he might have derived from the premises by the exercise of reasonable diligence.⁵⁸ In one case where the administrator of the lessee took possession of the premises, upon the death of the lessee, which proved wholly unproductive, and after eight months the administrator offered to surrender them to the lessor, it was held that he was not chargeable.⁵⁹

34. The same or similar rules prevail in the American states. Thus, it has been held, that the personal representative of the grantee in fee is liable in covenant for the rent, where the grantee

* 286 * has covenanted for himself and his personal representatives to pay rent in fee.⁶⁰ And the same rule prevailed in Pennsylvania, before the case of *Quain's Appeal*,⁶¹ since which it has been considered, that as ground-rents are perpetual in their nature, it could not be made consistent with the character of the office of executor or administrator, that any such perpetual obligation should be devolved upon him. The point is very elaborately and clearly argued by Mr. Justice *Lowrie*, and it seems difficult to escape from the force of his reasoning, or the justice of his conclusions.

35. It will follow from what has been already said, that where the lessee assigns the term, during his life, the personal representative will not be liable, as assignee, although he may be so held upon an express covenant to pay rent. And he may be liable, in debt, in the detinet, for the rent, as executor, unless the lessor have received rent from, or in some way accepted the assignee for his tenant.⁶² And the mere acceptance of the assignee, by the lessor, for his tenant, will not exonerate the personal representative of the lessee from liability upon an express covenant to pay rent to the lessor, unless there is some evidence to show that it was understood such acceptance should exonerate the lessee and

assets, for rents unpaid, whether the term is of any value or not. *Howse v. Webster*, Yel. 103, and *Metcalf's* note.

⁵⁷ *Rubery v. Stevens*, 4 B. & Adol. 241.

⁵⁸ *Hopwood v. Whaley*, 6 C. B. 744.

⁵⁹ *Remnant v. Bremridge*, 8 Taunt. 191.

⁶⁰ *Van Rensselaer v. Platner*, 2 Johns. Cas. 17.

⁶¹ 22 Penn. St. 510.

⁶² *Helier v. Casebert*, 1 Lev. 127.

his representative.⁶³ But if the personal representative assign the term, he is only liable for rents accruing during his time, upon the general principle already stated.⁶⁴

36. But it has been held, that the grounds of exemption of executors and administrators from responsibility for rent, do not apply to the case of a covenant to repair; and that where the executor has occupied the premises, it is no excuse for not performing the covenant of his testator the lessee, to keep the premises in repair, that they had yielded no profit.⁶⁵ And the addition of * the plea of plene administravit and of an offer * 287 to surrender before breaches occurred, will make the defence good.⁶⁵ And where the executors enter and occupy the premises, an implied obligation results therefrom, and from the lessor abstaining from giving notice to determine the lease, that the executors are content to be bound by all the stipulations of the lease, on the part of the lessee.⁶⁶

37. If the demise is for years, and not under seal, the entry of one of the executors will not so inure, on behalf of both as to render them both liable for use and occupation.⁶⁷

38. As we have before intimated, it seems to be settled, as the general rule, in the absence of particular covenants to the contrary, that covenants in indentures of apprenticeship, both on the part

⁶³ *Leigh v. Thornton*, 1 B. & Ald. 625. It was here held that the statute of limitations was a good defence to an action for rent against one who had once been tenant from year to year, but who had not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy could be inferred.

⁶⁴ Ante, pl. 27, and cases cited. After such assignment the executor is not liable, except upon the express covenants of the lessee, and then only in his representative capacity, and to the extent of assets in his hands. *Wilson v. Wigg*, 10 East, 313.

⁶⁵ *Tremeere v. Morison*, 1 Bing. N. C. 89. The ground of the distinction seems to be that the breach of a covenant to repair is in the nature of waste, and the executor is held liable for all waste, whether permissive or voluntary. *Ives v. Sammes*, 2 Anders. 51. See also *Hornidge v. Wilson*, 11 Ad. & Ell. 645.

⁶⁶ *Buckworth v. Simpson*, 1 Cr., M. & Rosc. 834. This was where the demise was in writing, but not under seal, and was for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it, by notice to that effect from either party. See also *Arden v. Sullivan*, 14 Q. B. 832, 840.

⁶⁷ *Nation v. Tozer*, 1 Cr., M. & Rosc. 172.

of the master and the apprentice, will terminate with the life of either, being strictly of a personal character on the part of both.⁶⁸ But it is said, in some of the cases, that the estate is bound to maintain the apprentice, which seems inconsistent with the rule already laid down, unless he can be required to serve another master, according to the custom of London,⁶⁹ or unless it is so restricted, as to operate only to the extent of keeping him from becoming a public burden to the town or parish, which is probably all that is meant.

39. It is scarcely necessary to repeat here the rules of law applicable to the husband's responsibility for the debts of the wife. He is liable, only during the coverture, for debts contracted by the wife before marriage, unless, and to the extent, he may receive assets as her representative; and for her debts contracted during coverture he is only responsible to the extent of her agency on his behalf, and that will be terminated by his death, whether known to the party giving the credit or not.⁷⁰ And his representative

* 288 will * only be responsible for the payment of such debts of the wife contracted before marriage, as he assumes during the coverture; and for those contracted during coverture, to the extent of her agency.

40. A good deal of learning will be found in some treatises upon the general subject of the duties of executors and administrators, in regard to the particular forms of action and of defence which may be maintained, either in their favor or against them. But as this pertains chiefly to the subject of procedure, and that is mainly regulated by code, at the present time, in the American states, we should not deem it useful to occupy much space here upon that topic.⁷¹

41. In regard to the operation of the statute of limitations, in suits against the personal representative, it is generally considered, that if the creditor intend to rely upon a new promise he must declare upon such new promise, and not attempt to bring it in by way of replication, since that will be a departure in pleading, provided the declaration count upon promises on the part of the

⁶⁸ *The King v. Peck*, 1 Salk. 66; *Baxter v. Burfield*, 2 Strange, 1266; ante, § 25, pl. 5.

⁶⁹ 2 Wms. Exrs. 1599, 1600.

⁷⁰ *Ibid.* 1601, 1602; *Blades v. Free*, 9 B. & Cress. 167.

⁷¹ 2 Wms. Exrs. 1753, 1817.

deceased.⁷² But it is claimed to have been held, at *Nisi Prius*, in England,⁷³ that a promise, on the part of the executor or administrator, will sustain the averment of a new promise on the part of the testator within six years.

42. But, as the personal representative has no authority to create debts against the estate, his acknowledgment of the existence of such debts could not properly be said to have any effect in regard to the removal of the statutory bar.⁷⁴ It has accordingly been held, that nothing short of an express promise will have that effect;⁷⁵ and if there be more than one executor or administrator it would seem requisite to prove a joint promise by all, in order to maintain a joint action.⁷⁶ The subject of the effect of the statute * of limitations upon claims made against the * 289 estate of a deceased person is very satisfactorily discussed by *Parker*, Ch. J., in a case in New Hampshire,⁷⁷ and the

⁷² *Browning v. Paris*, 5 M. & W. 117, per *Parke*, B., *Benjamin v. De Groot*, 1 Denio, 151; ante, § 27, pl. 10.

⁷³ 2 Wms. Exrs. 1761, n. (z); *Buswell v. Roby*, 3 N. H. 467.

⁷⁴ *Atkins v. Tredgold*, 2 B. & C. 23, 28, by *Abbott*, Ch. J.

⁷⁵ *Tullock v. Dunn*, Ry. & M. 416.

⁷⁶ *Abbott*, Ch. J., in *Tullock v. Dunn*, Ry. & M. 416; *Parke*, B., in *Scholey v. Walton*, 12 M. & W. 510. But the American cases are not entirely harmonious upon this point. In *Emerson v. Thompson*, 16 Mass. 429, it seems to be considered that the promise of one executor to pay a debt of the testator barred by the statute of limitations, will remove the bar as to all, and a similar rule obtains in many of the other states. *Hord's Admr. v. Lee*, 4 Monr. 36; *Head v. Manners*, 5 J. J. Marsh. 255. The distinction goes upon the question whether the mere acknowledgment of the debt by the personal representative will be sufficient to remove the bar. Most of the American cases, as well as the English, require an express promise to produce that effect. *Peck v. Botsford*, 7 Conn. 172; *Cayuga Bank v. Bennett*, 5 Hill, 236; *Hammon v. Huntley*, 4 Cowen, 493; *Forsyth v. Ganson*, 5 Wend. 558; *McIntire v. Morris*, 14 Wend. 90; *Oakes v. Mitchell*, 15 Maine, 360; *Thompson v. Peter*, 12 Wheaton, 565. And in Pennsylvania it seems to be considered that a prior express promise to pay the debt, made by the personal representative, is no unimpeachable answer to the plea of the statute. *Fritz v. Thomas*, 1 Wharton, 66; *Reynolds v. Hamilton*, 7 Watts, 420. But see *Johnson v. Beardslee*, 15 Johns. 3, where it is held that the express promise of one or more of the executors will bind all absolutely and irrevocably. But to make the promise of any effect, it must appear the person making it was executor at the time. *Larason v. Lambert*, 7 Halst. 247, 255.

⁷⁷ *Hodgdon v. White*, 11 N. H. 208. The following extract from the opinion of the court in this case affords a valuable commentary upon this general question, and an extended summary of the decisions: "The abstract in

* 290 cases extensively quoted and commented * upon. It is there declared, that, as a general rule, the personal repre-

Thompson v. Peter, 12 Wheat. 565, is that 'An acknowledgment of the debt by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations.' It may be doubted whether the opinion of Mr. Chief Justice *Marshall* sustains this as the decision. He says, 'The original administrator did acknowledge the debt, but said there were no funds in hand to pay the debts of the testator.' — 'The conversation with one of the present defendants was still farther from being an acknowledgment.' He proceeds to say, that had this been a suit against the original debtor, these declarations would not have been sufficient, but that it was brought against his personal representatives, who might have no knowledge; and adds, 'Declarations against him have never been held to take the promise of a testator or intestate out of the act. Indeed, the contrary has been held.' This may have been intended as an assertion that a mere acknowledgment of the debt, by the personal representative, was not sufficient to take the case out of the statute; but the decision evidently proceeds upon the ground that there had been no such acknowledgment. It has, however, been ruled in England, at *Nisi Prius*, that a mere acknowledgment of a debt, by an executor, will not take the case out of the statute; but that there must be an express promise. *Ryan & Moody*, 416, *Tulloch v. Dunn*; and it was further ruled, in the same case, that an express promise by one of two executors was not sufficient; which would seem to be somewhat adverse to the spirit of other decisions there, founded upon an admission of payment by one of two joint debtors. But the distinction may be sound. This court has held that evidence of admissions made by an administrator is competent to prove a new promise. *Hale v. Roberts*, cited in *Busswell v. Roby*, 3 N. H. 468. This, of course, must be understood as referring to admissions of an existing debt of the intestate, which the administrator was liable and willing to pay, from which a promise might be inferred. A letter from an administrator, written nearly five years after the death of the intestate, referring to a demand made upon him, saying that he expected to be in the city in a few days, and would settle the matter in some way, has been held sufficient to take the case out of the statute. 5 Binney, 573, *Jones v. Moore*. In *Johnson v. Beardslee*, 15 Johns. 3, the court held that a promise by executors would take the case out of the statute, where the action was against the heirs and devisees, the executors being two of the defendants. It has been decided in Massachusetts that a new promise by an executor or administrator, within six years, takes the case out of the statute of limitations, as well in an action against an administrator *de bonis non*, as against the original executor or administrator. 16 Mass. 429, *Emerson v. Thompson*. And in *Atkins v. Tredgold*, 2 Barn. & Cres. 23, although it was held that the payment of interest by one maker of a note did not take the case out of the statute as to the executors of another, no doubt was expressed of the power of the executors to do so. Lord *Hardwicke* said that no executor was compellable, either in law or equity, to take advantage of the statute of limitations, against a demand otherwise well founded.

sentative is not bound to interpose the general statute * of * 291 limitations in bar of the recovery of a demand against the estate, which is otherwise well founded. Of this there can be no question. But the personal representative will be understood as acting, somewhat, upon his own responsibility, in presuming to recognize and pay debts clearly barred by the statute of limitations, so long as that might jeopardize the full payment of other claims.

1 Atkins, 524, *Norton v. Frecker*. This general principle seems to be fully settled by the authorities already adverted to. Vide also Angell on Lim. 278; Williams on Executors, 1196; 13 Mass. 164. It has been decided that an executor has no right to retain for a demand barred by the statute due to himself personally, notwithstanding there was a provision in the will for the payment of all just debts. 3 Wend. 503, *Rogers v. Rogers*. The administrator was deemed to have no rights except as a creditor; and a case of that description may, perhaps, well form an exception to the rule allowing him to take a demand out of the operation of the statute. But a further question is suggested by the case *Mooers v. White*, 6 Johns. Ch. 360, 389, where Mr. Chancellor Kent expressed the opinion, that the heirs, or persons interested in the real estate, might appear before the surrogate, or judge of probates, and oppose the application of the executor for a sale of lands, and might interpose the statute of limitations, in the same manner as if they were sued by the creditor; and that to warrant an order for a sale of the real estate, for the payment of debts, it must be shown that there were debts, not barred by the statute of limitations, beyond the amount of the personal estate. There were other points, however, upon which that case turned, and the decision of it is predicated in no small degree upon the statutes and practice of New York. So far as the reasoning is based upon general principles, it is an authority here, entitled to the highest respect; but we are of opinion that we cannot adopt the conclusion just stated, under our statute, and the practice prevailing in this state. If we admit the power of the executor or administrator to remove the bar of the statute of limitations in any case, by his acknowledgment or promise, we cannot well make a distinction between the personal and real estate, and deny the existence of the power where its exercise may affect the latter, while we admit it if it will affect the personal alone." See *Amoskeag Co. v. Barnes*, 48 N. H. 25; *Hall v. Woodman*, 49 id. 295. See also *Lewis v. Rumney*, Law Rep. 4 Eq. 451. There is a statutory bar imposed in most of the states, where claims against an estate, settled in the insolvent form, are not presented to the proper tribunal for allowing them within the time prescribed. And in such cases there is no relief, unless afforded by some exception in the statute, or where new assets come to the hands of the executor or administrator after the time limited for distribution in the first instance. But it has been held that the rents of real estate in the hands of the administrator, accruing after the expiration of the term for the payment of the debts, will not be regarded as new assets, but as properly belonging to those entitled to such real estate. *Alden v. Stebbins*, 99 Mass. 616.

And it is here declared, that if the claim is of so long standing as to become stale, or from evidence is presumptively paid, aside from the statutory bar, it will be proper for the probate court in their discretion to refuse a license for the sale of real estate to pay the same. And it is here also held, with great propriety, that the personal representative has no discretion to recognize the validity of a claim barred by the statute for the despatch of the settlement of estates by not being presented in time. It has been held that the administrator is not bound to plead the statute of frauds against an oral promise of the intestate to pay his daughter a sum of money.⁷⁸ And such an express promise, to be of any avail, as the foundation of an action against the personal representative, must, it would seem, be upon some sufficient consideration, independent of the debt itself, such as having assets and the delay to sue; one or both.⁷⁹

See 29 Ch. 358 ca. 4a

⁷⁸ *Re Garratt's Trusts*, 18 W. R. 684. A bar declared by statute, unless a claim is presented to the personal representative within a prescribed time, is regarded in the nature of a penalty, and should receive a strict construction. *Broderick v. Smith*, 3 Lans. 26; 3 U. S. Dig. N. s. 299. In *Cape Girardeau County v. Harrison*, 58 Mo. 90, upon careful review of the question, it was held that the bar of the statute of limitations to a note or bond will not be removed by the new promise of the personal representative of the debtor. But where the same is secured by mortgage of real estate, the recognition of the existence of the debt by the personal representative of the mortgagor, is evidence tending to remove any presumptive bar from lapse of time, in a proceeding to enforce the mortgage security.

⁷⁹ Any arrangement between the creditor and the representative of the debtor will not have the effect to remove the bar of the statute. *Preston v. Day*, 19 Iowa, 127. And the omission of the personal representative to give notice for presenting claims against the estate will not prevent the operation of the statute. *Bank of M. v. Plannett*, 37 Ala. 222. It was held in one case in Alabama, *Bell v. Nichols*, 38 Ala. 678, that the statute bar began to operate in that state from the date of granting administration in another state. But this is contrary to the general rule elsewhere stated, that administrations in different states are wholly independent of each other. In a recent case, *Wells v. Child*, 12 Allen, 333, the question is discussed of giving relief in equity, under a special statute in that state, providing for remedy to creditors, who have claims against the estates of deceased persons, which have not been prosecuted within the time limited by law, where justice and equity require it, and the party is not chargeable with culpable neglect. It is there held, that the facts, that the creditor is a married woman and resides in another state, and that when she applied to the personal representatives for payment they assured her that they would make payment so soon as they could sell certain real estate, which they were in immediate expectation of doing, and

* 43. A payment by a joint contractor, after the death of his co-contractor, although sufficient to take the case out of

constantly assured her that no further legal proceedings were necessary, in relation to her claim, and that she, trusting in these assurances, made no further efforts to enforce the claim within the time limited by law, did not entitle the party to any relief under the statute. Substantially the same rule is declared in other cases in this state under the same statute, *Jenney v. Wilcox*, 9 Allen, 245 ; *Waltham Bank v. Wright*, 8 Allen, 121. The cases seem to go upon the ground that it is culpable neglect in the creditor not to prosecute his claim within the time limited by law, whether he in fact knew of the limitation or not ; and that ignorance of the law excuses no one, unless he were prevented by some substantial fraud. It seems to us questionable how far a different view might not have been maintained, in some of the cases certainly, upon safe and just grounds. See *Burroughs v. McLain*, 37 Iowa, 189. See also *Hill v. Mixter*, 5 Allen, 27, as to the construction of the Massachusetts statute in regard to the extension of the time for bringing actions in case of the decease of either party. On the general question of the operation of statutes of limitation, both general and special, the following cases may be consulted : *Ames v. Jackson*, 115 Mass. 508 ; *Clark v. Sexton*, 23 Wend. 477 ; *McKinder v. Littlejohn*, 1 Ired. 66 ; *Hooper v. Bryant*, 3 Yerg. 1 ; *Stephens v. Barnett*, 7 Dana, 257 ; *Steel v. Steel*, 12 Penn. St. 64 ; *Burleigh v. Stott*, 8 Barn. & C. 36 ; *Goddard v. Ingram*, 3 Q. B. 839 ; *Brathwaite v. Britain*, 1 Keen, 206 ; *Griffin v. Ashby*, 2 Carr. & K. 139. In the recent case of *Gwynne v. Gell*, 20 L. T. N. s. 508, before the Master of the Rolls, Lord *Romilly*, it was held that even in regard to trust property, the cestuis que trustent may become disentitled to maintain a bill in equity for the recovery of the rents of copyholds, in which the trust estate had been wrongfully invested ; where they had taken no steps to recover the same for more than fifteen years after the knowledge of the diversion had become known to them ; and where, during the whole period, the widow of the deceased trustee had occupied the lands and taken the income under a claim of right.

In *Burdick v. Garrick*, 18 W. R. 387, where the owner of an estate in England, himself residing in America, in 1858 appointed the defendants his attorneys to manage the same, and died in 1859, and no administration was had upon his estate until 1867, and a bill was then brought for an account of the money received, which was resisted on the ground of the statute of limitations, it was held that the defendants standing in a fiduciary relation, the money received by them was held upon such a trust that the statute would not operate to bar the claim, and that the defendants must account for the same with interest. The Vice-Chancellor directed interest to be cast with half-yearly rests. But the Court of Chancery Appeal held that the decree must be modified in this respect, and only simple interest allowed. This decision in the Appellate Court went upon the ground that it could not award interest by way of penalty or punishment for misconduct, but that it has regard to the profit which the trustee has made or must be presumed to have made out of the trust funds. Lord Justice *Giffard* said, the trustee, if he

* 293 the operation * of the statute of limitations as to a co-contractor still living, will not have that effect as to one already deceased.⁸⁰ And it will make no difference that the surviving co-contractor was also the executor of the deceased one.⁸¹

44. Neither will any acknowledgment or payment upon the debt, on the part of the personal representative of the deceased co-contractor, have any effect in removing the bar as to the survivor.⁸²

45. But where the testator never came within the state, that fact will remove the operation of the bar of the statute, whenever the statute contains such an exception.⁸³

46. But, as we have before intimated, it is no excuse that the debtor died before the statute bar became effectual, and that no personal representative had been appointed until just before the suit brought, for if the statute once begins to run it will continue to run until the bar is complete, unless there is some exception in the statute which arrests its operation.⁸⁴

46 *a*. There is an exception in the English statute (*a*) saving the rights of such as have been delayed in their suit, through the fraudulent suppression of the knowledge of their rights. This doctrine has been adopted into the construction of statutes of limitation in many of the American states, upon general principles of equity, by which the party against whom any right is attempted to be gained by fraud, either in the suppression of facts or the suggestion of falsehood, shall not be affected by any apparent delay or acquiescence. In a recent case in the English Court of Chancery

uses the money may be presumed to have received simple interest; "but that cannot be presumed as to compound interest: it must be proved by the bill." The Lord Chancellor, *Hatherly*, said, that if it were charged in the bill, and proved that the defendants received interest on the money with semi-annual rests, or if that were admitted in the answer, it would justify charging the defendants with it, but not otherwise. Interest beyond what the trustee has actually received must always rest in the discretion of the probate court, and will not be allowed except in such cases as the trustee ought to have received it. *Clyce v. Anderson*, 49 Mo. 37.

⁸⁰ *Atkins v. Tredgold*, 2 B. & Cr. 23.

⁸¹ *Way v. Bassett*, 5 Hare, 55; *Brown v. Gordon*, 16 Beavan, 302.

⁸² *Slater v. Lawson*, 1 B. & Ad. 396.

⁸³ *Douglas v. Forrest*, 4 Bing. 686; *Story v. Fry*, 1 Y. & Coll. C. C. 603.

⁸⁴ *Rhodes v. Smethurst*, 4 M. & W. 42; s. c. 6 id. 351; *Freake v. Crane-feldt*, 3 My. & Cr. 499. See *Aiken v. Morse*, 104 Mass. 277; *Welsh v. Welsh*, 105 Mass. 229.

(*a*) 3 & 4 Wm. 4, c. 27, § 26.

Appeal (*b*) this question is considerably discussed, and the rule maintained that a court of equity has jurisdiction in such cases ; but that a party whose agent, at the time of the transaction in question, had knowledge of the fraudulent suppression, could not be allowed to claim the benefit of the exception in the statute.

47. One sued in his representative capacity cannot set off debts due him in his personal right, or vice versa.⁸⁵ But an executor, sued upon an account stated by him *as executor*, may set off any debt due the testator, since the account must be regarded as stated on account of the debts due from the testator.⁸⁶

* 48. Upon an action against the personal representative, * 294 if there is any deficiency of assets he must plead it, for a judgment against him generally is presumptive of assets to satisfy it.⁸⁷ But if the representative plead *plene administravit*, the judgment for the debt, with such a plea upon the record, only binds the defendant to the extent of assets proved in his hands.⁸⁸ But debt or *assumpsit* lies against the personal representative on causes of action accruing subsequent to the death of the decedent, as where he refers a matter to arbitration, between the estate and some claimant, in the nature of unsettled accounts, and the arbitrator, without finding that there were assets, awards the personal representative to pay a certain sum, *plene administravit* will be no bar to the action.⁸⁹ But the personal representative may be declared against as administrator, although the process describe him only

(*b*) *Vane v. Vane*, L. R. 8 Ch. App. 383 ; ante, § 38, and n. 20 ; *Sugar River Bank v. Fairbanks*, 49 N. H. 131.

⁸⁵ *Bishop v. Church*, 3 Atk. 691 ; *Gale v. Luttrell*, 1 Y. & Jer. 180.

⁸⁶ *Blakesley v. Smallwood*, 8 Q. B. 538 ; *Rees v. Watts*, 11 Exch. 410, 415. But query, whether the account stated shall not be presumed to embrace all the dealings between the parties ? See *Patterson v. Patterson*, 59 N. Y. 574.

⁸⁷ *Wheatley v. Lane*, 1 Saund. 219 b, note. But if the creditor seek to charge the executor with the payment of a debt due from the estate on the ground of assets which he has applied to other purposes with the consent of such creditor, the executor must show such consent on the trial of the question of his *devastavit*, and cannot rely upon it as a ground of escape from the judgment of *devastavit*. This was so ruled on the authority of *Richards v. Browne*, 3 Bing. N. C. 493, holding that assets so misapplied by consent of a creditor are the same to him as if they never existed. *Jewsbury v. Mumery*, L. R. 8 C. P. 56, in Exch. Chamber.

⁸⁸ 1 Saund. 219 b, note ; *Cousins v. Paddon*, 2 Cr., M. & Rosc. 547, by *Parke, B.*

⁸⁹ *Riddell v. Sutton*, 5 Bing. 200.

personally.⁹⁰ And it has been held in America, that in an action against the personal representative a count upon the promise of the personal representative, as such, may be joined with a count upon the promise of the decedent, provided the consideration of the promise sprung from or was connected with the estate.⁹¹ But it must appear that the entire action is either against the estate, or against the personal representative, in his personal capacity. A count against one as administrator de bonis non, cannot be joined with counts against him personally.⁹² It is always a good defence to an action against the personal representative, that he has been removed from office since the last continuance.⁹³

49. And if the defendant have only assets applicable to debts entitled to prior payment, he should show that in defence.⁹⁴

50. The inventory of the effects of the deceased is *primâ facie* evidence of what came to the hands of the executor or administrator, and will impose upon him the burden of showing how
* 295 * he has disposed of the same.⁹⁵ And all debts in favor of

⁹⁰ *Watson v. Pilling*, 3 Br. & B. 4.

⁹¹ *Howard v. Powers*, 6 Ham. 92; *Carter v. Phelps*, 8 Johns. 440; *Benjamin v. Taylor*, 12 Barb. 328.

⁹² *Godbold v. Roberts*, 20 Ala. 354; ante, § 27, pl. 6 and note.

⁹³ *Jewett v. Jewett*, 5 Mass. 275.

⁹⁴ 2 Wms. Exrs. 1770, 1771.

⁹⁵ *Giles v. Dyson*, 1 Stark. N. P. C. 32. The personal representative is not responsible for goods stolen or taken by robbery without his fault. *Fudge v. Durn*, 51 Mo. 264. But, in general, it may be said, he is responsible for the value of goods sold by him. *Matter of Saltus*, 3 Abb. App. 243. And his accepting payment in confederate money will be no excuse. *Bruce v. Strickland*, 47 Ala. 192. But see 47 Ga. 434; 68 N. C. 488; 22 Gratt. 628. The temporary character of all questions in regard to the responsibility of trustees for the depreciation of confederate currency while naturally on their hands in the convenient administration of the trust, will excuse any extended discussion of them. But we cannot forbear to say, that it seems to us a great misconception, not to call it by any more expressive name, to hold trustees responsible for the depreciation of a currency which they were compelled to use, and which no vigilance on their part would have enabled them to dispense with or to use without such depreciation. The rule laid down in the recent case of *Key v. Jones*, 52 Ala. 238, seems to us to give the precise definition of the true rule of law applicable to the question, when an administrator, exercising diligence, prudence, and good faith, accepts payment of a debt due his intestate, in confederate currency, he should be allowed a credit, although the currency depreciates or perishes in his hands, if he has not commingled it with his own funds, or been guilty of negligence or bad faith, in not paying it out.

the estate which appear upon the inventory, without any intimation that they are desperate, will be presumed good until the contrary be proved.⁹⁶ The early practice of the English courts was for the personal representative to mark upon the inventory all choses in action, either *separate* or *desperate*. And it was, for a time certainly, the American practice to inventory the choses in action, indicating whether they belonged to the class of collectible or uncollectible. The more recent practice here is, we think, to inventory choses in action in a very general way, and without any very definite indication of their character.

51. Costs, whether in favor or against the personal representative, are controlled mainly in the different states by statutory provisions. The general rule, and certainly the general reason and justice of the case, would seem to incline to the conclusion that where the personal representative prevails in the suit, whether as plaintiff or defendant, he should be allowed to recover full costs, the same as any other party.⁹⁷ And the rule is the same, although he plead different pleas, some of which are decided against him, provided the suit is finally decided in his favor.⁹⁸

52. But there seems to have prevailed in the American states considerable diversity of opinion in regard to the liability of executors and administrators for costs, where controverted suits were finally decided against them. The English rule seems to have been that they must pay costs, the same as any other party, when cast in the suit.⁹⁹ And the English cases all agree that the judgment shall be given for costs *de bonis propriis*.⁹⁹ But the

* American cases seem to go upon the ground that costs are * 296 in the nature of a penalty or punishment, and that an execu-

⁹⁶ *Shelley's Case*, 1 Salk. 296; *Smith v. Davis*, Bull. N. P. 140. But see *Giles v. Dyson*, 1 Stark. N. P. C. 32, where it is intimated that further proof may be required to charge the executor or administrator with the collection of debts due the estate. As to the effect of the inventory in proof of assets, see ante, § 30.

⁹⁷ *Cockson v. Drinkwater*, 3 Doug. 239.

⁹⁸ *Ragg v. Wells*, 8 Taunt. 129; *Edwards v. Bethel*, 1 B. & Ald. 254. See also *Marshall v. Willder*, 9 B. & C. 655, 657; *O'Hear v. Skeeles*, 22 Vt. 152, where it is held, that under the Vermont statute executors and administrators stand upon the same ground as other suitors in regard to costs; and we see no reason why they should not.

⁹⁹ *Hancock v. Prowd*, 1 Saund. 336 a, 336 b, note; *Dearne v. Grimp*, 2 W. Bl. 1275.

tor or administrator ought not to be subjected to their payment, where it is apparent he acted in good faith in bringing and prosecuting the suit.¹⁰⁰ But the rule in Massachusetts at an early day, seems to have conformed to the English rule.¹⁰¹ And where the suit is founded upon some act or omission of the executor himself, and the suit might be brought against him in his private capacity, he will be held liable to costs upon failure.¹⁰² And in New York the rule seems to have been generally maintained that executors and administrators must pay costs upon failure of the suit, the same as any other party.¹⁰³

SECTION II.

BY RESORT TO A COURT OF EQUITY.

1. Courts of equity do not generally relieve upon claims not surviving at law.
2. But in some cases of mistake and error, relief in equity will be granted.
3. Equity will grant an account of the avails of waste against personal representative.
4. Courts of equity charge the personal representatives of trustees for breaches of trust.
5. Equity will enforce a debt against the personal representatives of a deceased partner. Mode of procedure.
6. Reference to two cases, where these principles are more fully discussed.
7. It is not the professed rule in courts of equity to grant relief against the representative of a deceased joint contractor, unless the obligation were substantially several.
8. But in fact the English equity courts allow the remedy in all cases of joint contracts, on the presumed ground that it was intended to be several as well as joint.
9. The estate of a deceased partner not released until payment, or clear consent.
10. The mere continuance of the dealing with, or accepting interest of new firm, not sufficient.
- * 297 * 11. Courts of equity will decree the renewal of lease against personal representative who has entered into possession, and has assets.

¹⁰⁰ *Frogg's Exr. v. Long's Admr.*, 3 Dana, 157; *Morse v. M'Coy*, 4 Cow. 551; *Evans v. Pierson*, 1 Wend. 30; *Robert v. Ditmas*, 7 id. 522.

¹⁰¹ *Hardy v. Call*, 16 Mass. 530; *Brooks v. Stevens*, 2 Pick. 68; *Healy v. Root*, 11 id. 389.

¹⁰² *Barker v. Baker*, 5 Cow. 267; *Chamberlain v. Spencer*, 4 Cow. 550.

¹⁰³ *Hogeboom v. Clark*, 17 Johns. 268; *Cuylers v. Kniffin*, 2 Wendell, 243; *Rudd v. Long*, 4 Johns. 190; *Brown v. Lambert*, 16 Johns. 148; *Kellogg v. Wilcocks*, 2 Johns. 377; *Salisbury v. Philips*, 12 id. 289.

12. How far the heir or devisee may insist upon the conversion of personal into real estate.
13. The specific legatee may insist upon the executor removing all incumbrances.
14. All payments of assessments on shares to be made by legatee, if imposed after decease of testator.
15. The grounds upon which relief may be given upon a contract for legacy.
16. But where the nature and extent of the legacy rests in discretion, no action lies.
17. Courts of equity will not decree the execution of a gift, but will of contracts to assign or to grant annuities.
18. Equitable remedies against representative, to same extent, as against decedent.
19. In England, courts of equity exercise control over executors and administrators as trustees.
20. In America, they sometimes act in aid of the probate courts.
21. Occasions where resort to courts of equity is needful.
 - (1.) Where it is required to fix the construction of the will.
 - (2.) To recover general legacies, or a distributive share, but not specific legacies.
 - (3.) Creditors' bills, and bills to prevent connivance and conspiracy, proceedings thereon.
 - (4.) Bills for an account against representative and surviving partner.
 - (5.) Writs of ne exeat and similar process, but not against *femes covert*.
22. Statutes of limitation and lapse of time, how far operative.
23. Will not bar a legacy, but may, if aided by circumstances.
24. No occasion to appoint receivers, to take charge of effects, in America, the powers of probate courts being entirely adequate.
25. The executor may pay the amount of contested legacy into court and have costs.
26. Where executors waste the estate, legacy due them will be retained.
27. How far courts of equity may interfere to control the conduct of executors by mandatory injunction.
28. Courts of equity will interfere for the relief of legatees and distributees, where otherwise there is no adequate redress.
29. Courts of equity may decree payment of a debt accidentally omitted from the report of the commissioners.

§ 40. 1. COURTS OF EQUITY will not ordinarily interpose for the purpose of affording relief against the personal representative, upon the ground of the general reasonableness and justice of the claim, and that the cause of action does not survive at law, but will, for the most part, strictly adhere to the rules of law, established for the government of the courts of common law, in that respect.

2. But there are, doubtless, some few cases to be found in the books, where courts of equity seem to have granted relief against the personal representative, chiefly upon the ground of the defect of remedy against the representative at common law. Thus in ** Pulteney v. Warren*,¹ it was held, that the simple case * 298

¹ 6 Vesey, 73. And where the creditor of an estate failed to present his claim to the personal representative within the time limited, whereby it was

of the death of the occupier will not lay the ground for a bill in equity for an account of the mesne profits on the ground of accident. But where the action of ejectment had been stayed by an order of the court of law, and by an injunction in chancery, at the instance of the occupier, who had finally failed, both at law and in equity, an account was decreed against the executors of the occupier for the recovery of the mesne profits, he having deceased before final judgment in the action at law. But this decision goes upon the ground, that where the party has been hindered in the prosecution of his right by the act of the court, he shall be put in the same condition as he would otherwise have been in. And in a more recent case,² it was held, both by the Master of the Rolls and by Lord *Brougham*, Chancellor, with some hesitation, that where the widow of the testator, with the acquiescence of his heir, was let into possession of certain freehold premises, under an erroneous supposition that they passed to her under the will, and before the error was discovered, or her right disputed, she died, that her personal representative was liable to account, upon a bill in equity, for the rents received during her continuance in possession.

3. And it seems, that although the personal representative is not liable to any action at law, for waste committed by the deceased,³ yet if the deceased have dug ore, or cut timber, and converted the same into money, or received money from

barred at law, a court of equity can grant no relief under the statute allowing relief where there was no culpable neglect by reason of the creditor living in another county from that where deceased and his personal representative resided and the administration was granted, and having no knowledge of such administration, the personal representative having given all the notice required by statute. *Richards v. Child*, 98 Mass. 284, s. p. ; *Waltham Bank v. Wright*, 8 Allen, 121 ; *Jenney v. Wilcox*, 9 id. 245 ; *Wells v. Child*, 12 id. 333 ; ante, § 39, pl. 42, and note.

² *Monypenny v. Bristow*, 2 Russ. & My. 117. If there is any doubt about the soundness of this decision, it arises, we think, upon the point, how far the deceased could be held liable for rents received under a claim of right acquiesced in by the owner of the land. The most which can be made of the case seems to be, that the deceased occupied the lands under the belief that she was the owner, and the owner himself acquiesced in her occupation under the same belief. This would certainly not create good title in the party thus by mistake inducted into the title and possession ; but it would seem that it should, in justice, foreclose any claim for rent.

³ Ante, § 39, pl. 20.

his tort in any similar mode, the owner of the estate may maintain a bill in equity for an account against the personal representative.⁴ The Lord Chancellor here said, that where the property came to the possession of the executor, or the testator had disposed of it in his lifetime, the executor was clearly liable to account for it, if the avails come to his hand. So, where a tenant, holding without impeachment for waste, and having the right to cut proper timber, cuts ornamental trees, or those not ripe for cutting, a court of equity will hold the personal representative liable to account for the avails of what is thus cut.⁵

4. It seems to have become the established rule in courts of equity, not only to charge persons acting in the capacity of trustees with the consequences of all breaches of trust committed by them, but to charge their personal representatives also, whether the estate derived benefit from the breach of trust or not.⁶

5. We have seen that, at law, no action lies against the personal representative of a deceased joint contractor, who left other joint contractors surviving.⁷ But in equity it seems to be entirely well settled, that in regard to partners, the creditor may also pursue the estate of the deceased partner for the collection of his debt, if he so elect.⁸ And all which it seems important for the creditor to show, in order to maintain a bill against a deceased partner's estate, is the fact of his being bound to the payment of the debt, in the first instance, and that the same is not paid. No question of insolvency on the part of the other partner properly arises in the case, since the representatives of the deceased partner, if compelled to pay the debt, will have their remedy against the partnership effects in the hands of the other partners, and against them * personally, for contribution to any loss or deficiency * 300 which may arise.

⁴ *Bishop of Winchester v. Knight*, 1 P. Wms. 406.

⁵ *Lansdowne v. Lansdowne*, 1 Mad. 116. But a court of equity will not direct an account against the personal representative of such a tenant for suffering dilapidations about the mansion-house. *Lansdowne v. Lansdowne*, 1 Jac. & Walk. 522.

⁶ *Adair v. Shaw*, 1 Sch. & Lef. 243, 272; *Scurfield v. Howes*, 3 Br. C. C. 90, 91; *Lord Montford v. Lord Cadogan*, 17 Vesey, 485, 489.

⁷ *Ante*, § 39, pl. 22.

⁸ *Devaynes v. Noble*, 1 Mer. 529. See also *Vulliamy v. Noble*, 3 Mer. 593, 619; *Winter v. Innes*, 4 My. & Cr. 109.

6. We have examined the question of the rights of the creditors of a partnership in case of insolvency, and of the equities subsisting among the several partners, in two cases, decided many years ago, where these questions are discussed more at length than will here be proper.⁹

7. The remedy against the estates of deceased partners, for the common indebtedness, granted in courts of equity, seems to proceed upon the ground that all partnership obligations bind each separate partner to the same extent as if he were the sole debtor. And it does not appear to have been the professed practice in courts of equity to allow any remedy against a deceased joint contractor, upon the mere ground of the joint undertaking, nor unless there was some ground of treating the deceased joint contractor as equitably bound, in a several obligation, to see the payment made.¹⁰ This was pointedly ruled by Sir *William Grant*, M. R.¹¹

8. But Lord *Eldon*,¹² while expressing his "own surprise that a court of equity should have interposed to enlarge the effect of a legal contract," confesses his conviction that such was the present state of the equity law.¹³ And we were compelled,¹⁴ after a very careful and patient examination of the cases, to come to the same conclusion,—that while the courts of equity professed to maintain some color of adherence to the legal form of the contract, they had, in reality, entirely abrogated all distinction in this respect, between a strictly joint contract and one which was several as

⁹ *Washburn v. Bellows Falls Bank*, 19 Vt. 278; *Bardwell v. Perry*, id. 292.

¹⁰ *Primrose v. Bromley*, 1 Atk. 89; *Bishop v. Church*, 2 Ves. Sen. 100, 371; *Hoare v. Contencin*, 1 Br. Ch. C. 27; *Thomas v. Frazer*, 3 Vesey, 399; *Burn v. Burn*, 3 Vesey, 573; *Ex parte Kendall*, 17 Vesey, 514, 525.

¹¹ *Sumner v. Powell*, 2 Mer. 30; s. c. affirmed, T. & R. 423. See also *Richardson v. Horton*, 6 Beavan, 185; *Rawstone v. Parr*, 3 Russ. 424, 539; *Clarke v. Bickers*, 14 Sim. 639, where the same rule seems to have been attempted to be maintained.

¹² *Ex parte Kendall*, 17 Vesey, 514, 525.

¹³ Lord *Eldon*, in *Ex parte Kendall*, supra. "The modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out, as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will under certain modifications constitute that demand."

¹⁴ *Bardwell v. Perry*, 19 Vt. 292, 300.

well * as joint. We there said: "Another mode in which * 301 the English courts of chancery have dispensed with this rule, shows very clearly, I think, that no confidence in its justice is there felt. It is now, I consider, a settled rule in the English chancery, to treat all joint bonds as several also, upon the ground of a supposed mistake in the execution of them, where there is not positive proof, outside of the contract itself, that it was positively the intention of the parties to the bond, that it should be joint and not several. This practice is treated as a virtual reforming of the deed, upon the ground merely that the parties must have intended to bind all the signers for the whole debt, and equally.¹⁵ And although courts of equity may sometimes have applied this same rule of intendment to other cases, it is certain that its application here must have been intended to get rid of the application of that rule of distribution of separate estate, which would work manifest injustice if applied. But thus to save the necessity of infringing an absurd general rule, by what, in others, would be deemed scarcely less than a palpable evasion, can never be creditable to a court of justice. It would be more dignified and more consistent with a just regard to truth to abrogate the rule."

9. Considerable discussion has taken place in the courts of equity in regard to the extent of the continuance of the liability of the estate of a deceased partner for the debts of the house; and what acts on the part of the creditor shall be held sufficient to extinguish that liability. And it seems to rest much upon the same ground as the responsibility of the former firm, when a new firm is created, either by the coming in of new partners, or the retirement of one or more of the old partners, or by both. It seems clear, that any cause, or continuance of dealing, with the surviving partners, after the decease of one or more of the firm, which shall evidence a clear willingness and intention on the part of the creditor to look exclusively to the surviving members of the old house, under the altered state of circumstances, will be regarded as sufficient to release any claim he might have against the estate of the deceased partner.¹⁶

¹⁵ *Thomas v. Frazer*, 3 Vesey, 399; *Gray v. Chiswell*, 9 Vesey, 118; *Burn v. Burn*, 3 Vesey, 573; *Thorpe v. Jackson*, 2 Y. & Coll. 553; *Wilkinson v. Henderson*, 1 Mylne & Keen, 582.

¹⁶ *Vulliamy v. Noble*, 3 Mer. 593, 619. Lord *Eldon* here said: "A deceased partner's estate must remain liable in equity, until the debts which

* 302 * 10. But it has been decided, that the mere continuance of the dealings with the surviving partners, after being made aware of the death of some of the partners, and abstaining, at the request of the survivors, from taking steps against the representatives of the deceased members of the firm, to enforce the payment of the debts,¹⁷ or the receipt of interest of the new firm, upon the old debt, will not exonerate the estate of the deceased member.¹⁸

11. The courts of equity will decree the renewal of a lease against the representative of the lessee, who had entered into possession of the premises and had assets,¹⁹ although it was said by Vice-Chancellor *Wood*, in the recent case of *Stephens v. Hotham*,²⁰ that he acted reluctantly, in so doing, and upon the authority of the case of *Phillips v. Everard*.¹⁹ And it was here ordered that the lease should be so framed that no personal liability should be incurred by the executors, although if they had claimed the lease as beneficial to them they must have entered into full covenants.

12. Where the testator had contracted for real estate, but not paid the price, at the time of his decease, the heir or devisee of the real estate in general, or of this in particular, may claim that the executor shall pay the price out of the personal estate. And if the money is advanced by the heir he may claim to be reimbursed out of the personalty.²¹ And where in consequence of the money for the price not being forthcoming, in season to meet the contract, the vendor rescinded it, the heir or devisee may nevertheless insist that the personal representative shall invest the same amount of personal estate in other lands for his benefit.²¹ But it seems that this will not be so ordered by the court, unless in cases where the will discloses an intention to have so much personalty, at all events, invested in real estate which shall thus inure for the benefit of

affected him at the time of his death have been fully discharged." But this discharge may be implied from the after-conduct of the creditor and the surviving partners. *Thompson v. Percival*, 5 B. & Ad. 925; *Brown v. Gordon*, 16 Beav. 302; *Lee v. Flood*, 2 Sm. & Gif. 250; *Lyth v. Ault*, 7 Exch. 669. Or the bar may be merely of an equitable character in the nature of an estoppel in pais. *Ex parte Kendall*, 17 Vesey, 514, 526. by Lord *Eldon*, Chancellor; *Winter v. Innes*, 4 My. & Cr. 101, 110. See also *Whitwell v. Warner*, 20 Vt. 425, 443.

¹⁷ *Winter v. Innes*, 4 My. & Cr. 101.

¹⁸ *Harris v. Farwell*, 13 Beav. 403.

¹⁹ 5 Sim. 102.

²⁰ 1 Kay & J. 571.

²¹ *Broome v. Monck*, 10 Vesey, 597.

the * heir or devisee; and not in such cases even, unless it * 303 can be carried into effect without detriment to creditors.²²

13. And if a specific legacy is under pledge or mortgage created by the testator, at the time of his decease, the specific legatee will be entitled to have the same redeemed by the executor, and if he fails to do so the legatee will be entitled to compensation to the extent of his loss, out of the general assets.²³ So where the testator devised all his wines and stock in trade, it was held that where a cargo arrived and was reported before the death of the testator, and entered immediately after, the executors and not the legatees were chargeable with the duties.²⁴

14. In general, where shares in joint-stock companies are specifically bequeathed, the legatee will take them subject to the payment of all future calls.²⁵ But in the late case of *Armstrong v. Burnet*,²⁶ Sir *J. Romilly*, M. R., took the distinction, that where any further payments were requisite to perfect the title of the testator, or to place it in the condition, in which the testator considered and treated it, in bequeathing it, such payments shall be made by the executor, but otherwise, by the legatee.

15. Courts of equity sometimes interfere on behalf of persons who have performed services for another, in faith of receiving a legacy which was not given. But in order to entitle the party to such a decree in his favor, the evidence should make a clear case of virtual fraud or mistake. The services should be clearly of a character to be of pecuniary value to the testator, and such as he had no right to expect without compensation, and such as the party performing them would not have rendered except under the expectation of receiving an equivalent in some form. Thus in a late case²⁷

²² Lord *Eldon*, Chancellor, in *Broome v. Monck*, 10 Vesey, 597, 618, et seq. Consequently, if the title to the particular estate fails, or there was not a perfect contract, or for any reason the court deem it inexpedient to carry the contract into effect, the result will be, that no perfect conversion of personal into real estate was effected.

²³ *Knight v. Davis*, 3 My. & K. 358; Swinb. pt. 7, § 20, pl. 18.

²⁴ *Stewart v. Denton*, 4 Doug. 219. See also *Marshall v. Holloway*, 5 Sim. 196; *Hickling v. Boyer*, 3 Mac. & Gor. 635; *Fitzwilliams v. Kelly*, 10 Hare, 266.

²⁵ *Blount v. Hipkins*, 7 Sim. 43; *Jacques v. Chambers*, 2 Coll. C. C. 435; *Clive v. Clive*, Kay, 600; *Wright v. Warren*, 4 DeG. & Sm. 367.

²⁶ 20 Beav. 424. ²⁷ *Loffus v. Maw*, 8 Jur. N. S. 607; s. C. 3 Giff. 592.

* 304 before Vice-Chancellor *Stuart*, it was held, that where * a testator, in advanced age and ill health, induced the plaintiff, a niece, to reside with, and continue valuable services to him, on the faith of his representations that by so doing she would become entitled to the property for life, at his death; and by a codicil to his will, which was read over and explained to her, trusts were created in her favor, but which were revoked by a subsequent codicil; that a court of equity would declare such revocation inoperative, as in violation of the contract with the plaintiff. The learned judge held, that the representation bound the specific property, as much as if the testator had stipulated, upon a money consideration, not to revoke the trusts created in favor of the plaintiff, the same as a contract to pay for services rendered will bind the general assets. This was a case where it might have been considered, that the contract not being in writing, i.e., the contract not to revoke, it would not bind real estate. And we find some such strictures upon the decision in the English journals.²⁸ But aside from any question of the statute of frauds, there can be no doubt a court of equity, or even a court of law, will allow compensation to a party who has advanced money, or performed valuable services, in faith of a legacy, provided there is clear evidence that the promise to leave the legacy was absolute, and for a definite amount.

16. But we apprehend in the ordinary case of performing services for another, under the expectation of receiving a legacy, where the nature and amount of the legacy is wholly indefinite in the minds of the parties; thus resting entirely in the good-will of the testator, that it cannot be claimed there is any absolute obligation created thereby. And in all the cases here enumerated, which must embrace most of this class, there can be no recovery.²⁹ But in a very recent case, before Sir *J. Romilly*, M. R., it was held, where in consideration of the plaintiffs agreeing to execute a conveyance of certain property, part of their father's estate, to a purchaser, another party promised to leave them as much as they would get under their father's will, that his estate was bound to make good the promise, and that it did not come within that section of the

²⁸ London Jurist, May 31, 1862; 8 Jur. N. S. pt. 2, p. 282.

²⁹ *Osborn v. Guy's Hospital*, 2 Str. 728; *Baxter v. Gray*, 3 Man. & Gr. 771; *Money v. Jordan*, 2 DeG., M. & G. 318.

statute of frauds requiring contracts, not to be performed within a year, to be in writing.³⁰

* 17. As a court of equity will not interfere to compel the * 305 party during his life to complete a mere gratuity, which he may have promised, no more will it decree the performance against his personal representative.³¹ But a contract for the conveyance of an annuity will be decreed to be carried into effect against the party.³² And an agreement, upon full consideration, to grant an annuity, will be decreed to be carried into effect by the executors.³³ And if a deed be delivered to a third party, as an escrow to be delivered to the grantee upon the performance of specified conditions, and the grantor die before their performance, and they are afterwards performed, the deed will thus become operative as of the date of its execution, notwithstanding the death of the grantor.³⁴

18. As to the extent of equitable remedies against executors and administrators, it may be said, in general terms, that they exist to the same extent as they did against the decedent.³⁵

19. And while the jurisdiction of the settlement of estates remained in the ecclesiastical courts, the courts of equity in England were accustomed to sustain bills against executors and administrators for almost all matters affecting the performance of their duties, treating them merely as general trustees of the effects in their hands.³⁶

20. But in most of the American states, as already stated, at the present day courts of equity interfere in the administration of estates to a very limited extent, and only where the powers of the courts of probate, and their modes of procedure, preclude them from doing complete justice. And in some of the states, courts of equity professedly interfere only for the purpose, and to the extent, of rendering indispensable aid to the courts of probate, remitting

³⁰ *Ridley v. Ridley*, 11 Jur. N. S. 475; s. c. 34 Beav. 478.

³¹ *Hooper v. Goodwin*, 1 Swanst. 485; *Cotteen v. Missing*, 1 Mad. 176; *Meek v. Kettlewell*, 1 Phil. C. C. 342; *Searle v. Law*, 15 Sim. 95; *Dillon v. Coppin*, 4 My. & Cr. 647; *Beech v. Keep*, 18 Beav. 285.

³² *Pritchard v. Ovey*, 1 Jac. & W. 396.

³³ *Nield v. Smith*, 14 Vesey, 491.

³⁴ Lord *Ellenborough*, Ch. J., in *Copeland v. Stephens*, 1 B. & Ald. 593, 606, where the word "executors" is by mistake printed for "escrow."

³⁵ 2 Wms. Exrs. 1819.

³⁶ *Adair v. Shaw*, 1 Sch. & Lef. 243, 262; 1 Story, Eq. Jur. § 532.

their decrees to that court to be carried into effect. And this, it seems to us, will be found so much the more convenient form of administering equitable relief in such cases, that it will ultimately * obtain general acceptance.³⁷ But in some of the states it seems to be supposed that courts of equity have a kind of concurrent jurisdiction with the probate courts in the distribution of the assets of the estates of deceased persons.³⁸ We believe that no such practice prevails, at the present day, in any considerable number of the states.

21. The only cases of the interference of courts of equity in the settlement of estates which it will be important to advert to here, are the following.

(1.) Where there are conflicting claims against the executor, growing out of different constructions of the will, and which it is necessary to settle for the security of the executor before he acts in the matter, the rights of the several claimants may be determined by a bill in the nature of a bill of interpleader, brought by any party in interest. This we have sufficiently considered in a former part of this work.³⁹

(2.) Bills in equity seem to be the only remedy against an executor for neglecting or refusing to pay a general legacy. It was at an early day held, that an action of assumpsit will lie in such cases.⁴⁰ But it was finally decided, upon great consideration,⁴¹ that no action at law will lie to recover a legacy, unless there is some special contract to pay, upon some new and independent consideration, as forbearance to sue,⁴² or where there has been an adjustment between the legatee and the executor, and the latter is agreed to be released from his fiduciary responsibility, and an agreement, as upon an account stated, that he shall hold the money for the legatee in his personal capacity,⁴³ in which cases it has been held an action at law will lie. And the same rule which

³⁷ *Adams v. Adams*, 22 Vt. 50; *Stewart v. Stewart*, 31 Ala. 207; *West v. Bank of Rutland*, 19 Vt. 403; *Morse v. Slason*, 13 Vt. 296; s. c. 16 id. 319; ante, § 27, pl. 12.

³⁸ *Seymour v. Seymour*, 4 Johns. Ch. 409; *Van Mater v. Sickler*, 1 Stockton, 483; *Clarke v. Johnston*, 2 id. 287.

³⁹ Ante, Vol. I. § 36.

⁴⁰ *Atkins v. Hill*, 1 Cowp. 284; *Hawkes v. Saunders*, 1 Cowp. 289.

⁴¹ *Deeks v. Strutt*, 5 T. R. 690; *Doe v. Guy*, 3 East, 120.

⁴² *Davis v. Wright*, 1 Ventr. 120; *Smith v. Johns*, Cro. Jac. 257.

⁴³ *Roper v. Holland*, 3 Ad. & Ellis, 99; *Bond v. Nurse*, 10 Q. B. 244.

obtains in regard to legacies has been extended to a distributive share in an estate.⁴⁴ But the same rule does not apply to the recovery * of a specific legacy, since a complete title at * 307 law will vest in the legatee, upon the assent of the executor, and the legatee may maintain an action of trover, or any proper action for its recovery, after the title is thus perfected.⁴⁵

(3.) Legatees or creditors, or others interested in the amount of the assets of the estate being found sufficient to meet their claims, may bring a bill in equity on behalf of themselves and all others who may elect to come in under the decree, on the ground that the executors or administrators, and certain others, whether creditors or strangers, are conspiring to defeat the claims of the plaintiffs.⁴⁶ Of this nature are creditor's bills,⁴⁷ and bills for the marshalling of assets,⁴⁸ of which we shall speak more at length hereafter. But, generally speaking, there is no occasion, for any of these purposes, to resort to a court of equity, unless there are counter-interests and counter-claims, and an apprehended connivance between the personal representative and such counter-claimants, for the purpose of bringing about an inequitable distribution of the assets. For in all ordinary cases, and especially where all parties are witnesses, and compellable to make full disclosure, the powers of the Court of Probate are ample for the adjustment of all such questions. The subject of bills, in the nature of creditor's bills against the personal representatives of deceased persons, is more discussed in the English courts of equity, than in the same courts in America.⁴⁹ But the English courts of equity will not decree the personal representative to pay money into court, which he alleges in his answer a right to retain upon a debt due from the decedent to himself.⁵⁰ But, in general, the personal representative, in England, will be required to pay any fund in his hands, into court, upon a case being made against him for the necessity of an administration by a court of equity, and he cannot shield

⁴⁴ *Jones v. Tanner*, 7 B. & C. 542.

⁴⁵ *Williams v. Lee*, 3 Atk. 223; *Doe v. Guy*, 3 East, 120.

⁴⁶ *Fleming v. McKesson*, 3 Jones, Eq. 316.

⁴⁷ 1 Story, Eq. Jur. § 547.

⁴⁸ 1 Story, Eq. Jur. § 544 et seq.; *Morse v. Slason*, 13 Vt. 296; s. c. 16 id. 319.

⁴⁹ See *Dryden v. Foster*, 6 Beav. 146; *Donald v. Bather*, 16 id. 26.

⁵⁰ *Middleton v. Poole*, 2 Coll. C. C. 246.

himself therefrom by the payment of debts not properly chargeable upon the fund.⁵¹

* 308 * (4.) There are some cases, where the assets are complicated by partnership relations, that a claimant against the estate may maintain a bill for an account against the executor, and the surviving partner, without alleging collusion between them; and especially may this be done by the residuary legatee.⁵²

(5.) Writs of *ne exeat regno*, and other special process peculiar to courts of equity, may be issued against executors and administrators, upon laying the proper foundation, and under the same restrictions and limitations as in other cases.⁵³ But such a writ will not be allowed against the wife alone, being executrix or administratrix.⁵⁴

22. It is a familiar rule in equity law that the statute of limitations will operate to bar all legal claims, in a court of equity as well as in a court of law.⁵⁵ But trusts being peculiarly of equitable cognizance are not within the terms, or the equitable construction, of the statute of limitations.⁵⁶ But the party will be allowed to allege special facts in aid of the presumption, from lapse of time (which alone is held insufficient upon which to presume the release or extinguishment of a trust), with a view to induce the court to presume against the continued liability of the trustee.⁵⁷

23. It has accordingly been held that the statute of limitations is no bar to a suit in equity for the recovery of a legacy in those states where there is no remedy at law.⁵⁸ But where the laws of a state allow an action at law for the recovery of a legacy, as well as by application to the courts of equity, the statutory bar will operate in both tribunals, unless the legacy is made a charge upon

⁵¹ *Lord v. Purchase*, 17 Beav. 171.

⁵² *Bowsher v. Watkins*, 1 Russ. & My. 277; *Gedge v. Traill*, 1 Russ. & My. 281, in note. If the executor decesses after the decree, and before it is carried into effect, the suit may be revived against the administrator *de bonis non*, or any one into whose hands the effects come. *Adair v. Shaw*, 1 Sch. & Lef. 243, 262.

⁵³ 2 Wms. Exrs. 1834, 1835.

⁵⁴ *Pannell v. Tayler*, Turn. & Russ. 96.

⁵⁵ *Hovenden v. Annesley*, 2 Sch. & Lef. 607, 630, 631.

⁵⁶ *Wedderburn v. Wedderburn*, 2 Keen, 722.

⁵⁷ *Dickenson v. Lord Holland*, 2 Beav. 310.

⁵⁸ *Anon.*, 2 Freem. 22, pl. 20; *Parker v. Ash*, 1 Vernon, 256.

real estate.⁵⁹ And lapse of time and attending circumstances, as * the distribution of the assets, without any * 309 claim for the payment of the legacy being made, has always been held ground for presuming the payment of a legacy.⁶⁰

24. There are many cases where the courts of equity in England have interposed to appoint receivers to take charge of the estate, when there was any good reason for apprehending that it was being wasted by the executor or administrator, or by those in whose charge it had been left in their absence from the country. But there is no occasion to discuss any such question here, since the courts of probate have ample power to grant relief in all such cases, and the remedy will be far more effective, as well as more expeditious there, by removing the obnoxious party and appointing a suitable one in his place, than it could possibly be in a court of equity, through the cumbrous machinery of appointing receivers. So that bills for the administration of the assets of deceased persons in the Court of Chancery, through the agency of their officers, which are, or were, of every-day occurrence in England, while the jurisdiction of the ecclesiastical courts continued over probate matters, almost never occur in the American states, unless under a suggestion of fraudulent connivance or combination, or where the power of the courts of probate are inadequate to effect the desired equitable results.⁶¹

25. Where there is a controversy between different claimants in regard to the payment of a legacy, and the matter is in litigation, the executor may pay the money into court, and be allowed to retain out of the estate the costs of such payment into court, those of paying it out again being borne by the legatee.⁶¹

26. In some cases where executors have become indebted to the estate in the course of administration, a court of equity will direct that a legacy due them be applied towards such indebtedness.⁶²

⁵⁹ *Souzer v. DeMeyer*, 2 Paige, 574, 577, by *Walworth*, Ch.

⁶⁰ *Higgins v. Crawford*, 2 Ves. Jr. 571, 572, by Lord *Loughborough*, Chancellor. See also *Pickering v. Lord Stamford*, id. 581; *Jones v. Turberville*, id. 11. Payment will be presumed, under circumstances, after the lapse of twenty years. *Andrews v. Sparhawk*, 13 Pick. 393.

⁶¹ *In re Cawthorne*, 12 Beav. 56. A receiver may be appointed pending the grant of probate. And also pendente lite of the rents of real estate, if neither the devisee nor the heir-at-law are in possession. *Parkin v. Seddons*, L. R. 16 Eq. 34.

⁶² *Skinner v. Sweet*, 3 Mad. 244.

27. One or more of two or more joint executors may maintain an action, in the nature of a bill in equity, against other joint executors for an accounting, without joining the creditors, legatees, * or next of kin, unless it be a case of final accounting.⁶³ Where the executor is also trustee under the will, and the duties of the two offices are distinct, the court may award a discharge from one and not from the other. But if one or more of the executors are guilty of misconduct in dealing with the estate, a court of equity will interfere, in a proper case, to compel such delinquent executors to place the notes, bonds, accounts, and other securities of the estate, in his hands, in such custody, as to enable the co-executors to have access to them; and may direct the manner in which they shall co-operate with the other executors in discharging their duties under the will.⁶³

28. Courts of equity will interfere for the relief of legatees, distributees, and others having an interest in the estate, against the acts of the personal representative, upon a proper case being made for the exercise of the jurisdiction of the court, it appearing that there is no adequate remedy in the probate, or other court of law.⁶⁴

29. There is one case,⁶⁵ where a court of equity decreed payment of a debt, confessedly due from the estate of a decedent, which the commissioners had failed, through accident or mistake, to embrace in their report, the estate being settled in the insolvent form.

SECTION III.

REMEDY FOR THE RECOVERY OF LEGACIES AND DISTRIBUTIVE SHARES, EITHER AT LAW OR IN EQUITY.

1. No action at law will lie for the recovery of a general pecuniary legacy.
2. An action at law may be maintained upon the express promise of the executor.
3. But the only adequate and appropriate remedy is in equity.
4. Specific legacies, when assented to by the executor, may be recovered at law.
5. A distributive share in an estate cannot be recovered at law, even upon express promise.
6. There are many cases where the party's only remedy is in the probate court, or in a court of equity.

⁶³ *Wood v. Brown*, 34 N. Y. 337.

⁶⁴ *Beattie v. Abercrombie*, 18 Ala. 9; *Parsons v. Parsons*, 9 N. H. 309.

⁶⁵ *Dickey v. Corliss*, 41 Vt. 127.

7. No action at law or in equity will lie until the executor is decreed by the probate court to pay the legacy.
8. Interest recoverable upon legacies, when due.
9. Statute of limitations no defence until the trust is closed.

§ 40 a. 1. It seems, at one time, as we have already briefly intimated,¹ to have been very generally conceded in the English * courts of common law, that the legatee may have an * 311 action at law against the executor for the recovery of a general pecuniary legacy, after his assent to the sufficiency of assets in his hands to pay the same, as well as all claims against the estate of a higher grade.² But when the cases came to be carefully considered, it was felt, that the executor ought not to be subjected to an action at law for failure to perform an evident trust, and it was accordingly decided, in the case already referred to,² that no action at law will lie. The importance of the remedy in such cases, and the fact that some of the American states have not followed the rules of the common law in regard to it, seem to require a more extended examination of the point³ than we have before made.¹

2. There seem to have been some actions, at an early day at common law, sustained against executors for the recovery of legacies, on the ground of express promises to pay, in consideration of assets and of forbearance to sue.³ But in the time of Lord *Mansfield*, Ch. J., the rule seems to have been clearly established, that an action of assumpsit will lie upon the express promise of the executor to pay the same in consideration of having assets applicable to that purpose.⁴

3. But even to this limited extent, the remedy at common law is imperfect, and by no means adapted to all the exigencies of the case. For, as said by the judges in *Deeks v. Strutt*,² if the legacy belong to the wife, and it is allowed to be recovered at law, it must go into the hands of the husband, without the court being able to secure any indemnity to the wife against the loss or misapplication of the money. And in both the cases just cited from Cowper, in

¹ Ante, § 40, pl. 21 (2).

² Lord *Kenyon*, Ch. J., in *Deeks v. Strutt*, 5 T. R. 692, where his lordship refers to several then recent decisions, where that had been held.

³ *Davis v. Wright*, 1 Ventris, 120; *Smith v. Johns*, Cro. Jac. 257.

⁴ *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, id. 289.

the time of Lord *Mansfield*, the legacies were recovered by the husbands for the benefit of their wives.

4. But it has long been settled that in the case of a specific legacy, after the assent of the executor thereto, by recognizing the fact that he has no occasion to retain the same to meet the payment of debts or other prior claims, the property passes to the legatee, and an action at law for the recovery of the same, upon the basis of such property being in him, will lie.⁵ But this

* 312 by no * means requires the extension of a remedy, at law, for general pecuniary legacies. It seems certain that, in England, the only remedy in such cases resides in the courts of equity.⁶

5. It seems also well settled that, for the recovery of a distributive share in an estate, no action at law, except under some statutory provision, will lie.⁷ And it was held in the latter case that a special promise will not enable the party to maintain an action in cases of this character. But we see no reason why any distinction should be made, in this respect, between the case of a legacy and a distributive share.

6. In all cases where the executor omits or declines to assent to a specific or to a general pecuniary legacy, or denies the receipt of

⁵ *Doe v. Guy*, 3 East, 120 ; ante, § 40, pl. 21 (2), n. 45.

⁶ 1 Story, Eq. Jur. §§ 591, 592, 593, 594, 595.

⁷ *Jones v. Tanner*, 7 B. & C. 542 ; *Howard v. Brown*, 11 Vt. 361. But in some of the American states actions at law have been allowed for the recovery of legacies. *Farwell v. Jacobs*, 4 Mass. 634, where the legacy was for maintenance ; and the same rule seems to have been recognized in Connecticut from an early day. 1 Swift's Dig. 455 ; *Goodwin v. Chaffee*, 4 Conn. 163 ; *Knapp v. Hanford*, 6 id. 170. And in many of the states actions at law have been maintained upon special promises by executors to pay legacies in consideration of assets applicable to that purpose. *Dewitt v. Schoonmaker*, 2 Johns. 243 ; *Livingston v. Executors of Livingston*, 3 id. 189, 192 ; *Beecker v. Beecker*, 7 id. 99 ; *Clark v. Herring*, 5 Bin. 33. But in the same states the equitable remedy seems also to be maintained. *Colt v. Colt*, 32 Conn. 422. And in point of principle, as before stated, there is no good ground for allowing an action at law against a mere trustee upon the ground of a special promise to pay, unless where there has been a final settlement of the trust, and an agreed balance found in the hands of the trustee, which he promised to pay as the final balance due from him as trustee, which would amount to a termination of the trust and a conversion of it into a mere pecuniary debt.

sufficient assets, or for any other reason denies the obligation to pay such legacy or assent to its validity, the only remedy on the part of the legatee will be, either in the probate courts or in a court of equity.⁸

7. No action can be maintained upon the executor's bond for not paying legacies, until after his account is settled in the probate court, or in some way a decree is obtained there for the payment of such legacies.⁹ And, by parity of reason, no action, either at law or in equity, will lie for the recovery of such legacy against the executor, until after such decree is obtained, unless upon his express promise, as this would be drawing the controversy into another court.¹⁰

8. Pecuniary legacies carry interest after one year from the decease of the testator, unless the payment is further delayed by the terms of the will; and the executor will be required to pay interest thereafter, or from the extended time given by the will for the payment of legacies, in all cases where he has assets adequate for the payment of the same when due, and which are applicable to such payment, although no demand for such payment has been made.¹¹ And the fact that the legatee is an infant and has no guardian will not excuse the executor from the payment of interest, if he has not paid the money into court, or been hindered from making payment by reason of the want of a guardian.¹¹

9. The statute of limitations will be no defence to the executor, when sued for the non-payment of legacies, so long as he retains the assets in his hands and the trust is not closed.¹¹

⁸ 1 Story Eq. Jur. § 591, and cases cited.

⁹ Probate Court v. Kimball, 42 Vt. 320. ¹⁰ Ante, § 8, pl. 7, n. 20, p. 94.

¹¹ Kent v. Dunham, 106 Mass. 586; 2 Redf. Wills, § 31, p. 465 et seq.

THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR PERSONALLY, BY REASON OF HIS OWN ACTS.

1. The rule formerly was that the representative became personally liable upon all contracts of his own, even in his official capacity.
2. It is now settled that a promise, as executor, if within his authority as such, will not create any personal responsibility.
3. An account stated of matters between the testator and the creditor, by the executor, will create no personal responsibility.
4. But promises for money lent, or had and received by the representative, as such, bind him personally.
5. So, on counts for use and occupation, for goods sold and delivered, or labor and materials furnished to or by the personal representative, in that capacity, he is personally liable, all this being beyond his authority as such.
6. Promise for interest due on contract of deceased does not bind representative personally.
7. How far the possession of assets sufficient consideration for new promise by representative in personal capacity. It would seem not enough.
8. How the representative may make himself personally liable.
 - (1.) Must be new contract upon new consideration. Forbearance to sue held sufficient. Legacy. Credit for additional purchase sufficient. So also the surrender of 'title-deeds by attorney. Justice *Williams* holds possession of assets sufficient consideration for new promise.
 - (2.) The promise of the executor or administrator must be in writing. But in America consideration need not appear in the writing.
 - (n. 21.) Discussion of some of the grounds of personal responsibility for debts of deceased persons.
9. If representative undertake to perform an award he is bound personally.
10. But if the award be only that the estate is indebted, and no finding that representative shall pay, he is not so bound.
- 11 and n. 24. How far representative bound by contracts executed under power by attorney-in-fact.
12. Responsible for use of leased premises, where he enters.
13. But only to the extent of their value.
14. May become responsible, by improperly neglecting to oppose illegal or unfounded claims against the estate.
15. Personally responsible on covenants of title to real estate, sold for payment of debts.
16. Courts of equity will uphold family compromises and settlements.

§ 41. 1. It seems to have been supposed, until a comparatively late period, that whenever the personal representative was

sued, * upon any promise or contract made after the decease * 314 of the testator or intestate, that the defendant, if liable, would be held in his personal capacity, and the judgment be de bonis propriis.¹

2. But the later cases establish the point beyond question, that where the suit is based upon a contract or promise, merely *as executor or administrator*, if within his authority as such, the judgment will be only de bonis testatoris, and not de bonis propriis. Thus, where upon a submission to arbitration it was specially agreed the death of either party should not revoke the power of the arbitrator, and the arbitrator, after the death of the party, awarded that the executor should pay the other party a sum of money, and the suit was based upon these facts and the promise of the executor to pay, it was held he was not thereby charged personally, but as executor only, and that judgment could not be given de bonis propriis.²

3. As before intimated, it seems now to be entirely well settled, that an action upon an account stated, of matters between the deceased and the creditor, made by the creditor with the personal representative, will only bind the latter in his representative capacity, and to the extent of assets in his hands.³ And it seems that it will make no difference whether the account is alleged to have been stated of money due from the testator to the plaintiff, or of money due from the defendant, as executor, to the plaintiff.⁴

4. But it seems that upon a promise by the executor for money lent to him as such, or for money had and received by him as such, the judgment will be de bonis propriis, and he cannot claim the benefit of a judgment de bonis testatoris, to which the plea of *plene administravit* will be a full answer.⁵

¹ *Trewinian v. Howell*, Cro. Eliz. 91 ; *Hawkes v. Saunders*, 1 Cowp. 289 ; *Jennings v. Newman*, 4 T. R. 347.

² *Dowse v. Coxe*, 3 Bing. 20 ; *Powell v. Graham*, 7 Taunt. 580.

³ *Ashby v. Ashby*, 7 B. & C. 444.

⁴ *Powell v. Graham*, 7 Taunt. 580 ; *Ashby v. Ashby*, 7 B. & C. 444. But it is held otherwise in *Rose v. Bowler*, 1 H. Bl. 108 ; *Coryton v. Lithebye*, 2 Saund. 117 e. The present rule, and the more reasonable one, as it seems to us, is unquestionably that stated in the text, so conceded by counsel in *Corner v. Shew*, 3 M. & W. 350. See also *Batard v. Hawes*, 2 E. & B. 287.

⁵ *Rose v. Bowler*, 1 H. Bl. 108 ; *Jennings v. Newman*, 4 T. R. 347 ; *Brigden v. Parkes*, 2 B. & P. 424. But the personal representative may mortgage the estate for money, borrowed on behalf of the estate, when that becomes

* 315 * 5. So on a count against the executor or administrator for use and occupation after the death of the testator, upon a promise by him as executor, it has been held that he is personally liable.⁶ So counts against the executor or administrator for goods sold and delivered to him as such, or for work and labor and materials furnished him, in his capacity of executor or administrator, and alleging a promise in such capacity to pay for the same, must charge him personally if at all, since he has no power to do such acts, except in his personal capacity.⁷

6. But upon a count alleging that the personal representative is indebted for interest due for forbearance of the debt, and that the decedent promised to pay interest, and that his representatives should do the same as long as the debt should be forborne, the obligation is not personal, but only in his representative capacity.⁸

7. It seems to be conceded, that the naked promise of the personal representative to pay the debt of the deceased, if there be no assets, is a mere nudum pactum.⁹ But when it is said that it is not requisite to aver that the personal representative had assets sufficient to pay the debt, it must be understood of those cases where the promise of the personal representative is upon some other sufficient consideration. If the promise is based upon the

necessary. *Burt v. Trueman*, 29 L. J. Ch. 902. But in this case the executor having accepted wine instead of money, for a considerable portion of the debt, it was held sufficient evidence that the debt was not created solely for the benefit of the estate, and that this was known to the mortgagee, and that his mortgage was therefore invalid.

⁶ *Wigley v. Ashton*, 3 B. & Ald. 101. But see *Atkins v. Humphrey*, 2 C. B. 654. But where the executor or administrator has an interest in real estate, as heir, devisee, or otherwise, which entitles him to possession of the same, and which he occupies without any arrangement with other parties interested, he is not liable to account for the income of such real estate. *Almy v. Crapo*, 100 Mass. 218.

⁷ *Corner v. Shew*, 3 M. & W. 350. So the common count for interest on the ground of forbearance, during the time of the personal representative, charges him personally. *Bradly v. Heath*, 3 Sim. 543; *Robinson v. Lane*, 14 Sm. & M. 161. So in *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, it was held that an action cannot be maintained against an executor or administrator, as such, for goods furnished, or services rendered to the estate, after the death of the testator or intestate.

⁸ *Bignell v. Harpur*, 4 Exch. 773.

⁹ *Pearson v. Henry*, 5 T. R. 6, 8; *Rann v. Hughes*, 7 T. R. 350, n. (a); s. c. in the House of Lords, 4 Br. P. Cas. 27.

having of assets applicable to the payment of the debt, and that is regarded as a sufficient consideration to uphold a promise of payment by the executor in his private capacity, it would seem necessary to allege the existence of such assets. But it may be questioned how far the mere possession of assets will be sufficient * to bind the personal representative, in his pri- * 316 vate capacity, by a mere promise of payment. It would seem there should be some other separate and distinct consideration, and that it should be apparent that this consideration moved between the new parties, and that the undertaking of the personal representative was on his own account. As where the creditor forbears to pursue, or waives some portion of his security or remedy, and in consideration thereof the executor or administrator promises to pay the debt.¹⁰

8. We come then to the consideration of the grounds upon which the executor or administrator may make himself personally liable for the debt of the deceased, or for any claim of debt or of any other character, against the estate so represented by them.

(1.) There must be a new and distinct contract by the personal representative, assuming personal responsibility for the claim, and this contract, unless under seal, must be upon valid legal consideration moving between the parties thereto.¹¹ It becomes often a very nice question what precise consideration will be sufficient upon which to found a new promise by the executor or administrator to answer for the debt of the deceased. Forbearance towards the representative in regard to enforcing the debt, it has repeatedly been held, will be regarded as a sufficient consideration.¹² But a promise to pay a debt, on the consideration of forbearance, to be valid, must be from one bound in some sense and to some extent, or in some capacity, to pay, or at least there must be some such ground of claim on the part of the creditor.¹³ But if the defendant, being executor, promise to pay a legacy in consideration of

¹⁰ *Templeton v. Bascom*, 33 Vt. 132. See also *Powell v. Graham*, 7 Taunt. 580, opinion of *Gibbs*, Ch. J. And any act of the personal representative, whereby he admits assets in his hands to meet a legacy or other charge upon the estate, will, *prima facie*, render him liable to respond. *Chaigneau v. Bryan*, 10 Ir. Ch. 172; Dig. 6 Jur. N. s. 79.

¹¹ Lord *Hardwicke*, in *Reech v. Kennegal*, 1 Ves. Sen. 123, 126.

¹² *Johnson v. Whitecott*, 1 Roll. Ab. 24, pl. 33; *Gardner v. Fenner*, id. 5, pl. 3; *Hawes v. Smith*, 2 Lev. 122.

¹³ *Fish v. Richardson*, Yelv. 55, 56; s. c. Cro. Jac. 47.

forbearance to sue for it, he is bound, and it is not material whether he have assets, or not.¹⁴ The rule is reaffirmed in more recent cases.¹⁵ It has been held that a promise by the administrator to * pay the debt of the deceased, in consideration of credit for an additional purchase in the same line, is upon a valid consideration and binding.¹⁶ So where the attorney surrendered deeds to the executor, which were useful to him in the settlement of the estate, upon a promise by the executor to pay his whole bill against the estate as well as against the executor, it was held a binding promise.¹⁷ It is laid down, in general terms, by Mr. Justice *Williams*, in his excellent treatise,¹⁸ "That if an executor or administrator promises in writing that, in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise, in his individual capacity, and the judgment against him will be *de bonis propriis*."

(2.) It must also appear, that the undertaking of the executor or administrator, for the debt of the deceased, is in writing, as well as upon sufficient consideration. The language of the English statute is, — "That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate," &c., "unless the agreement," &c., "or some memorandum or note thereof, shall be in writing, and signed by the party to be charged thereby."¹⁹ And most of the American statutes are substantially, and many of them identically, the same, except that by the construction of the English statute it was held, that the consideration of the promise, as well as the promise itself, must be in writing;²⁰ yet in some of the American states by construction, and in others by express statute, it is made sufficient to bind the party, if the contract sufficiently appears by the writing, and the consideration is otherwise proved.²¹

¹⁴ *Davis v. Reyner*, 2 Lev. 3; *Ridout v. Bristow*, 1 Cr. & J. 231.

¹⁵ *Childs v. Monins*, 2 Brod. & Bing. 460; *Barnard v. Pumfrett*, 5 M. & Cr. 66, 71. See *Bank of Troy v. Topping*, 9 Wendell, 273; s. c. 13 id. 557.

¹⁶ *Wheeler v. Collier*, Cro. Eliz. 406.

¹⁷ *Hamilton v. Incledon*, 4 Br. P. C. 4.

¹⁸ 2 Executors, 1647.

¹⁹ 29 Car. 2, ch. 3, § 4.

²⁰ *Wain v. Walters*, 5 East, 10; *Saunders v. Wakefield*, 4 B. & Ald. 595.

²¹ *Mass. Gen. Stats.* ch. 105, § 2; *Leonard v. Vredenburg*, 8 Johns. 29; *Bailey v. Freeman*, 11 id. 221; *Packard v. Richardson*, 17 Mass. 122; *Smith v. Ide*, 3 Vt. 290; *Sage v. Wilcox*, 6 Conn. 81. There are some few English cases where it has been held, that if one who is not executor or administrator,

* 9. It seems to be settled, that if the personal representative refer disputes between a creditor of the estate and the deceased, to arbitration, and in the submission stipulate, generally, to pay the amount of the award, he will be bound personally by the award.²² * 318

10. But if the award be only that the amount is due from the estate, and there be no order or finding that the personal represen-

for sufficient consideration, promises to assume all the debts of a deceased person, as if it be upon consideration that he is made co-administrator, that it will be valid, although not in writing. *Tomlinson v. Gill*, Amb. 330. Lord *Hardwicke* here said this undertaking could only be enforced in equity, not being made to the creditors or any particular creditor. If it were not for the apparent respect paid the case by stating it at length, we should have supposed that such a transaction was to be regarded as mere bravado, which could not be enforced by any tribunal. But the case seems to have been recognized by Lord *Northington*, in *Griffith v. Sheffield*, 1 Eden, 73, and by Sir *Wm. Grant*, in *Gregory v. Williams*, 3 Mer. 582, 590. But we very much question whether any American court would ever attempt to enforce any such undertaking in any tribunal. And it seems to have been referred to by Sir *Wm. Grant* more for the argument of Lord *Hardwicke*, that one from whom the consideration moves may enforce the promise in equity for the benefit of the party ultimately to be benefited, than for any other reason. That may be true in many cases, although contrary to the common course of procedure in a court of equity.

In a recent case in Vermont (*Templeton v. Bascom*, 33 Vt. 132), it was decided, where the defendant, being sole heir to an estate, promised the plaintiffs, who had an acknowledged valid claim against the estate, that if they would take no steps to enforce such claim he would pay it very soon, or upon request, that the promise was valid, and not within the statute of frauds, not being founded upon the consideration of the debt of the deceased, but upon forbearance. And in *Ridout v. Bristow*, 1 Cr. & J. 231, it was decided where the widow gave her promissory note for the debt of her late husband, being administratrix, that the note was valid on its face, and superseded the necessity of proving assets, and *Bayley, J.*, said he would "go still further and say, that it was not competent for her to show that there were no assets." And in a late case where the executor continued the testator's business in the name of his firm pursuant to directions in the will, and gave a promissory note to one of the creditors, being ignorant at the time of the insolvency of the estate, it was held that he was personally liable upon the note. *Lucas v. Williams*, 3 Gif. 150. So where the executors continue the testator's business of an innkeeper, they are responsible for the safe-keeping of the goods of the guests, either on the implied contract or in tort. *Morgan v. Ravey*, 6 H. & N. 265.

²² *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453; *Riddell v. Sutton*, 5 Bing. 200.

tative shall pay the amount, he will not be liable unless he have assets, or only to that extent.²³

* 319 * 11. An executor or administrator has sometimes been held responsible upon bills and other contracts given by attorneys-in-fact, under a power, for the amount of debts due from the estate. This will depend, of course, mainly upon the extent of the power, which must be determined by the terms of each particular case.²⁴

12. The personal representative of the lessee is liable for rent only to the extent of assets in his hands, unless where he enters and holds possession of the lands, after the death of the lessee. In the latter case he will be held responsible as assignee in respect of the perception of the profits, and for the rents de bonis propriis. So if he enter during a current quarter, he is personally responsible for the rent of that quarter to the extent of the value of the premises.²⁵

13. But as he is made responsible personally solely on the ground of his entry, possession, and the presumptive perception of the profits, and not on the covenants of his intestate in the lease, the rule of damages will be the actual value of the premises, which is presumptively represented by the rent received; but this presumption may be rebutted by evidence that the value was in fact less.²⁶ This subject is incidentally discussed elsewhere.²⁷

14. An administrator may render himself personally responsible

²³ *Pearson v. Henry*, 5 T. R. 6; *Worthington v. Barlow*, 7 T. R. 453; *Love v. Honeybourne*, 4 Dow. & Ry 814. But a judgment by default against an executor in respect of his testator's debt is an admission of assets, and binds the executor's own personal and real estate as fully as if it were his own debt. *Higgins in re*, 2 Gif. 562; s. c. 7 Jur. n. s. 403. And in such a case it was held that the judgment-creditor had a lien upon the estate of the executor prior to that of a later judgment-creditor for his own debt. *Ib.*

²⁴ *Gardner v. Baillie*, 6 T. R. 591, where it was held a mere power to collect will not authorize the attorney to draw bills. But a general power to transact all the business of the executor, and to pay, discharge, and satisfy all debts, will enable the attorney to draw notes or bills in the name of the principal. *Howard v. Baillie*, 2 H. Bl. 618.

²⁵ *Bigelow*, Ch. J., in *Inches v. Dickinson*, 2 Allen, 71; *Ipswich v. Martin*, Cro. Jac. 411; *Jevens v. Harridge*, 1 Saund. 1; *Buckley v. Pirk*, 1 Salk. 317; *Wollaston v. Hakewill*, 3 Man. & Gr. 297, 320.

²⁶ *Bigelow*, Ch. J., ubi supra, citing *Rubery v. Stevens*, 4 B. & Ad. 241; *Hornidge v. Wilson*, 11 Ad. & Ellis, 645; *Hopwood v. Whaley*, 6 C. P. 749.

²⁷ Ante, § 39, pl. 26 et seq. q. v.

to the parties injured, by improperly neglecting to oppose the allowance of illegal claims against the estate. But remedies of this character will be very much affected by the statutes of the different states.²⁸

15. Personal representatives, who sell the real estate of the deceased, mistakenly supposing him to have had legal title to the same, and who covenant in their deed to the purchaser, that, in *their capacity of administrator, &c., they are * 320 lawfully seised of the premises and that they are free of incumbrance, with an exception named, and that they have good right to sell and will warrant and defend the title, are personally responsible, on such covenants, for the consideration paid and costs incurred in defending the title.²⁹

16. The courts have generally manifested great forwardness in carrying into effect all compromises and family arrangements made to avoid litigation. Thus where certain of the heirs-at-law disputed the validity of a will, and it was orally agreed between the contestants and the executor, who was also a residuary legatee, that the opposition to the probate should be withdrawn, and the will proved, upon the executor paying over one-half his share of the estate under the will to the contestants, to be distributed among them, — and in faith of this agreement the probate of the will was allowed, — it was held that the agreement made the executor trustee for the contestants of the half of his share under the will, and that he might be decreed to pay the same over to the parties entitled to the same.³⁰ And in another case the court upheld a family compromise of litigated rights, though wanting some formalities, and subject to some doubts as to its fairness.³¹

²⁸ *Parsons v. Mills*, 2 Mass. 80.

²⁹ *Sumner v. Williams*, 8 Mass. 162.

³⁰ *Baylies v. Payson*, 5 Allen, 473.

³¹ *Gratz v. Cohen*, 11 How. U. S. 1.

GIFTS MORTIS CAUSA.

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§ 42. 1. GIFTS MORTIS CAUSA have been recognized, from a very early day, in the jurisprudence of civilized states.¹ They may be defined as a gift of personal estate, made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring, substantially as expected by the donor, and that the same be not revoked before death.² The conclusion of Justinian's definition seems to embrace the essentials of the gift, viz., the gift is such that the donor prefers himself to retain dominion over it rather than have the donee acquire it. But he prefers the donee should have it rather than his heir.

2. Swinburne³ defines this species of gift, "when any being in peril of death doth give something, but not so that it shall presently be his that receives it, but in case the giver do die. This last kind of gift is that which is compared to a legacy." This author names two other species of gift upon consideration of death, but which are both gifts *inter vivos*. 1. Where the gift is made absolutely in no present peril of death, but upon the general consideration of man's mortality. 2. Where the gift is made in peril of death, but is made irrevocable.

3. This species of gift so far resembles a legacy that it is ambulatory and revocable during the life of the donor.⁴ But it differs from a legacy in that it is not essential that it should be confirmed

¹ Justin. Inst. lib. 2, tit. 7, De Donationibus.

² Justinian, *supra*, thus defines it. "Mortis causa donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut siquid humanitûs ei contigisset, haberet is, qui accipit: sin autem supervixisset is qui donavit, reciperet: vel si eum donationis pœnituisset aut prius decesserit is, cui donatum sit . . . Et in summa, mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat; magisque eum, cui donat, quam hæredem suum." This species of gift will not include real estate, even where it is conveyed by deed. *Meach v. Meach*, 24 Vt. 591.

³ Part 1, § 7.

⁴ *Gibbs*, Ch. J., in *Bunn v. Markham*, 7 Taunt. 224, 231; *Merchant v. Merchant*, 2 Bradf. Sur. Rep. 432.

by any action, either of the probate court or by the assent of the executor.⁵ But if there be a deficiency for payment of * 323 debts, the * gift cannot take effect, since it is but a voluntary gift of the debtor, and to take effect after death.⁶

4. The subject of the true character, and the precise definition of gifts mortis causa was very thoroughly examined by *Gibson*, Ch. J.⁷ The learned judge here criticises the ordinary defi-

⁵ Lord *Hardwicke*, Chancellor, in *Ward v. Turner*, 2 Ves. Sen. 431, 432, 440; 1 Roper on Legacies, 3; *Lawson v. Lawson*, 1 P. Wms. 441.

⁶ *Lawson v. Lawson*, supra; 1 Roper, 2; *Smith v. Casen*, cited in *Drury v. Smith*, 1 P. Wms. 404. The same principle is abundantly recognized in the American courts. *Mitchell v. Pease*, 7 Cush. 350. But the fact that the decree of the probate court charges the administrator of the estate with the same property claimed by the donee, and directs its distribution among the next of kin, will not give the donee the right of appeal. *Lewis v. Bolitho*, 6 Gray, 137.

⁷ *Nicholas v. Adams*, 2 Whart. 17, 22. This case came up on writ of error to the District Court of the city of Philadelphia, where the subject is carefully examined, and will be found, 1 Miles, 90. In the Supreme Court, Ch. J. *Gibson* said: "All agree that it has no property in common with a legacy, except that it is revocable in the donor's lifetime, and subject to his debts in the event of a deficiency. The first is not because the gift is testamentary, but because such is the condition annexed to it; and the second, not because it is in the nature of a legacy, but because it would otherwise be fraudulent as to creditors; for no man may give his property who is unable to pay his debts." It was here held that the fact of the donor subsequently making his will was no revocation of the gift, nor did it indicate such a recovery from the apprehended peril of death as to amount to an implied revocation. Mr. Justice *Woodward*, in a late case, *Michener v. Dale*, 23 Penn. St. 59, 63, defines this species of gift to be that of a "chattel made by a person in his last illness or in periculo mortis, subject to the implied conditions that if the donor recover, or if the donee die first, the gift shall be void." The peril need not be such as to indicate speedy dissolution; for in the case of *Nicholas v. Adams*, supra, the donor lived fourteen days after, and made his will. And in no case has it been held, that it must appear that the donor was in such peril of immediate death as to be incapable of making his will. In *Wells v. Tucker*, 3 Binney, 366, the donor lived three days, and in *Michener v. Dale*, supra, six hours, and in neither of these cases, or any other, did it appear that stress was laid upon the fact of inability to execute a formal will. See also *Weston v. Hight*, 5 Shepley, 287; *Borneman v. Sidlinger*, 3 Shepley, 429. It is universally held that such gifts are not valid, as against a creditor. *Chase v. Redding*, 13 Gray, 418. But it is said by *Shaw*, Ch. J., in this case, although it does not appear in the head-notes of the case, "That such gifts, if confirmed and held good, do not impair the rights of the widow. Her right is to the property of which the husband died seised or possessed. These gifts have

dition * of these gifts, wherein it is said that it must be * 324 made during the last sickness, since the peril of death impending from any other cause will render the gift none the less of this character, and even where the apprehension of death was merely imaginary it would enable the donor to recall the gift after the apprehension had passed away just as much as if that had been made an express condition of the gift. So that the chief difference between this species of gifts, and those *inter vivos* is, that the former gifts, if made in the near prospect of death, and upon that consideration moving the donor, are in their nature conditional, and may be revoked whenever that state of apprehension is removed, whether any such condition was expressed in the gifts or not. But gifts *inter vivos*, when made in consideration of death not being very remote, nevertheless become absolute and irrevocable upon delivery, unless such condition of revocation be expressed in the gift. This difference is well illustrated by what we have before said of Swinburne's definition of the three species of gifts *mortis causa*.

5. We shall now briefly enumerate the requisites which are indispensable to constitute a valid gift *mortis causa*.

(1.) To render the gift finally effectual it must not only be made in apprehension of present peril of death, but death must ensue, without any perfect remission of the apprehended peril. The language of the early cases is quite significant upon this point. It must be made upon one's death-bed.⁸ And in *Gardner v.*

their full effect in the lifetime of the donor." But it seems to us very questionable, whether a man of substance can be allowed to dispose of his whole estate, and leave his widow a beggar, by the means of this species of gift, which is clearly of a testamentary character, where the statute expressly provides that the widow may waive the provisions of the will and come in for her full share of the personal estate, under the statute, by way of distribution. No similar statute has ever existed, in England, in favor of widows, and that question could not therefore arise there. And it is possible the American courts have felt too reluctant to recognize the difference in this respect, between the widow and the next of kin. Post, pl. 11, 15, and notes. See *Cranson v. Cranston*, 4 Mich. 230; ante, Vol. I. § 1.

⁸ *Lawson v. Lawson*, 1 P. Wms. 441. The term "last sickness" occurs here in the opinion of the Master of the Rolls, and this is the more common term in the English books. In the civil law, as already quoted from Justinian, the point is thus defined, "*quæ propter mortis fit suspicionem*," which may be rendered, which is made on account of, or in consideration of, the apprehension, suspicion, or expectation of death near at hand.

* 325 Parker,⁹ * the Vice-Chancellor said, "This bond was given in the extremity of sickness, and in contemplation of death, and it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death." Lord *Eldon*, in the important case of *Duffield v. Elwes*,¹⁰ said: "Nothing can be more clear than that a donatio mortis causa must be a gift, made by a donor in contemplation of the expected approach of death." And Mr. *Williams* thus defines this species of gift:¹¹ "If a gift be not made by the donor in peril of death, i.e., with relation to his decease by illness affecting him, at the time of the gift, it cannot be supported as a donation mortis causa." But it does not seem to be required, according to some cases, that there be direct and positive proof that the gift was made in the last sickness; and the intimation of *Eyre*, C. B.,¹² to the contrary is not found in other reports of the case,¹³ and is not regarded as sound law.¹⁴

⁹ 3 Madd. 184. See also *Knott v. Hogan*, 4 Met. (Ky.) 99. A soldier about leaving home to join the army handed two promissory notes to a friend enclosed in an envelope addressed to the plaintiff, saying if he never came back he wanted her to get them, that he would rather she should have them than any other person. They were delivered to her two days afterwards, the donor being then in good health, but dying of disease in the army four months after. It was held not a good donatio mortis causa. *Gourley v. Linsenbighler*, 51 Penn. St. 345; post, pl. 28. But one who was fleeing from the Confederate conscription in East Tennessee, was held to have been under sufficient apprehension of death to make a valid donatio mortis causa. *Gass v. Simpson*, 4 Coldw. 288. Sed quære.

¹⁰ 1 Bligh, N. s. 530.

¹¹ 1 Exrs. 726. But where it appears that the gift was made while the donor was ill, and only a few days or weeks before death, it will be presumed the gift was made in contemplation of death, and in the donee's last illness. See also *Tate v. Hilbert*, 2 Ves. Jr. 111; s. c. 4 Br. C. C. 286; *Hedges v. Hedges*, Finch, Prec. Ch. 269; *Miller v. Miller*, 3 P. Wms. 356. The American cases adopt the views already stated as to the gift being made in the prospect of death, which must ensue. *Parish v. Stone*, 14 Pick. 198, 203, 204; *Grover v. Grover*, 24 id. 261, 266; *Raymond v. Sellick*, 10 Conn. 480; *Grattan v. Appleton*, 3 Story, 755; *Dole v. Lincoln*, 31 Me. 422; *Kenney v. Public Administrator*, 2 Bradf. Sur. Rep. 319. But where such a gift was attempted to be made while sick with consumption, but where the donor was able to be about his ordinary business for months after, but finally died of the same disease, it was held the gift could not be supported. *Weston v. Hight*, 5 Shep. 287. See also *Staniland v. Willott*, 3 Macn. & G. 664.

¹² *Blount v. Burrow*, 1 Ves. Jr. 546.

¹³ 4 Br. C. C. 72.

¹⁴ 1 Wms. Exrs. 687; 1 Roper, 21; *Lawson v. Lawson*, ante, n. 8, 1 P.

(2.) But it seems agreed on all hands, that the gift, to operate as a good *donatio mortis causa*, must have been made to take effect only in the event of the donor's death, by his existing disorder.¹⁵ * But, as we have before intimated, it does not * 326 seem indispensable to the validity of such a gift, that the donor should, in terms, affix any such condition to the gift. But if it be made during the last illness, and nothing said to indicate that it was intended to become absolute and irrevocable without reference to the donor's death, in the mode and at the time then contemplated, it will be presumed to have been intended to be dependent upon that condition.¹⁶ And this species of gift is not only revocable by the recovery of the donor from his then present illness, but equally at any time before his death, by the mere volition of the donor, in the same manner and to the same extent, as any other testamentary disposition of property.¹⁷ It seems to have been supposed in some of the cases upon this subject, that the circumstance that the donor gave an unconditional assignment of the chattel was a decisive circumstance against it being regarded as a *donatio mortis causa*, since in that class of gifts the donor does not intend to part with the property, except in the event of his decease by his present peril of life. Thus where the obligee of a bond, five days before her decease, signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of it, without consideration, to a person to whom the bond was at the same time delivered, it was held that the facts did not constitute a good gift *mortis causa*.¹⁸ Lord

Wms. 441; *Miller v. Miller*, ante, n. 11, 3 P. Wms. 357; *Hill v. Chapman*, 2 Br. C. C. 612; *Snellgrove v. Baily*, 3 Atk. 214.

¹⁵ *Tate v. Hilbert*, 2 Ves. Jr. 111. It is here held that a gift, to take effect immediately, cannot be regarded as a *donatio mortis causa*. *Irons v. Smallpiece*, 2 B. & Ald. 551, 553, per *Abbott*, Ch. J. *Tate v. Leithead*, Kay, 658; *Staniland v. Willott*, 3 Mac. & G. 664, 675; *Ogilvie v. Ogilvie*, 1 Bradf. Sur. Rep. 356.

¹⁶ 1 Wms. Exrs. 687; 1 Roper, 4.

¹⁷ *Merchant v. Merchant*, 2 Bradf. Sur. Rep. 432. The learned judge here states the conditions upon which this species of gifts depends, very clearly, one of which is the donor's repentance of the gift, to which point may be cited abundance of authority, both from the civil-law and common-law writers. *Inst. lib. 2, tit. 7, § 1*; *Bracton*, lib. 2, cap. 26, § 1; 2 *Kent's Comm.* 445 et seq.; *Parker v. Marston*, 27 Me. 196.

¹⁸ *Edwards v. Jones*, 1 My. & Cr. 226.

Brougham, Chancellor, said: "I consider the language of the assignment itself to exclude the possibility of treating this as a *donatio mortis causa*." But we shall recur to this subject again under the point of gifts of choses in action.

(3.) There must be an actual delivery of the chattel to the donee, so as to transfer the possession to him, in order to constitute a good gift *mortis causa*. The cases are very numerous upon this point, presenting the question in every conceivable aspect, but all concurring in this, that there must be a substantial, tangible, * 327 and visible * change of the possession to the donee,¹⁹ or to some one in trust for him.²⁰ And it seems to be essential to the validity of the gift, that the possession should continue in the donee, or in some one else for his use, until the decease of the donor. For if the possession be resumed by the donor, it may

¹⁹ *Ward v. Turner*, 2 Ves. Sen. 431. See *Blake v. Pegram*, 109 Mass. 541.

²⁰ *Wells v. Tucker*, 3 Binn. 366, where the delivery was to the wife of the donor for the use of the donee, and it was held sufficient. See also *Bloomer v. Bloomer*, 2 Bradf. Sur. Rep. 339, 347, where the learned Surrogate said: "The truth is, a will under our laws is substantially a *donatio mortis causa*, that is, a gift to take effect on death, the donation being completed by the act of the executor or administrator. A real *donatio mortis causa* is made, by the donor being his own executor. There is no difference in the nature of these things, but only in the incidents flowing from the method of giving title. A *donatio mortis causa* has the substantial qualities of a legacy in being ambulatory or revocable. Its completion is conditioned or contingent upon death. It may be reclaimed or revoked during the donor's life. It is subject to the debts of the deceased, and in England has been declared by statute to be liable to legacy duties. (*Bunn v. Markham*, 7 Taunt. 231; *Drury v. Smith*, 1 P. Wms. 404; 2 Ves. Sen. 434; *Tate v. Hilbert*, 2 Ves. Jr. 120.) In one of the earliest cases, Lord *Cowper*, in defining this gift, says, 'if the donor dies, it shall operate as a legacy.' (*Hedges v. Hedges*, Prec. Ch. 269.) By the civil law, if the donee died before the donor, the gift lapsed (Inst. lib. 2, tit. 7, § 1). Before the time of Justinian, there was some doubt as to the true character of these donations, some classing them with last wills and legacies, others with donations *inter vivos*; and to resolve this, it was determined they should be treated as legacies. 'Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia.' (Inst. lib. 2, tit. 7, § 1; Cod. lib. 8, tit. 57, § 4.) It also appears that, by the civil law, donations *inter vivos* were revoked if the donor had no children, and happened to have children born to him afterwards. (Cod. lib. 8, tit. 56, § 8; Domat, § 8; 2 Burge, Com. 147.) By the French Code, ordinary donations are absolutely revoked by the birth of children. (2 Burge, 205.)" And see *Kenney v. Public Adm.*, 2 Bradf. Sur. Rep. 319; *Sessions v. Moseley*, 4 Cush. 87.

fairly be regarded as evidence of the revocation of the gift, since that is always in the power of the donor during his life.²¹ The language of *Abbott*, * Ch. J.,²² is very explicit. “It is * 328 a well established rule of law, that a donatio mortis causa does not transfer the property without an actual delivery.” By this is to be understood the actual tradition of the thing into the hands of the donee, or of some one for him.²³ The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor or by his order.²⁴ Thus where the donor, being in a declining state of health, delivered a locked cash-box to the donee, telling her to go, at his death, to his son for the key, and that the box contained money for herself, and entirely at her disposal after he was gone; but that he should want it every three months whilst he lived. The box was twice delivered to the donor, at his request, and he delivered it again to the donee, and it was in her possession at his decease. The box was broken open, by the donee, after the death of the donor, and found to contain a check of £500, drawn by a third party in favor of the donor, and inclosed in a cover indorsed with the donee’s name; and the key of the box, which the donor’s son had refused to deliver to the donee, had a piece of bone attached to it, with the donee’s name written upon it. It was held there was no sufficient delivery to constitute a good donatio mortis causa. Sir *Launcelot Shadwell*, V. C., held, that this was parting with the manual custody of the box, but so retaining the dominion over its contents, that it could not be fairly said to have been surrendered into the possession and control of the donee.²⁵ The same rule, substantially, has prevailed

²¹ *Ward v. Turner*, 2 Ves. Sen. 431, 433; *McGrath v. Reynolds*, 116 Mass. 566; *Bunn v. Markham*, 7 Taunt. 224. In this last case the donor had called for the India bonds, bank-notes, and guineas to be brought out of his iron chest and laid upon his bed. He then caused them to be sealed up in three parcels, and the amount of the contents to be written on them with the words: “For Mrs. and Miss C.,” the plaintiffs; he then directed the parcels to be locked up in the iron chest, and the keys to be sealed up and directed “to be delivered to J.,” his solicitor, and one of his executors, after his death, and replaced in his own custody near his bed, and afterwards spoke of the property as given to plaintiffs. It was held this did not amount to a good delivery and continuing custody in the donees, so as to create a donatio mortis-causa.

²² *Irons v. Smallpiece*, 2 B. & Ald. 551.

²³ *Drury v. Smith*, 1 P. Wms. 404; *Lawson v. Lawson*, id. 441.

²⁴ 1 Wms. Exrs. 690.

²⁵ *Reddel v. Dobree*, 10 Sim. 244; *Hawkins v. Blewitt*, 2 Esp. N. P. C.

in the American courts. In South Carolina,²⁶ it was held that there is no difference in regard to the delivery which is required in gifts mortis causa and other cases of parol gifts. In all such cases

the question is whether the donor has parted with his dominion over the property, or no. But the * form of transmitting the possession is not essential. The delivery, by the husband, of a bond evidencing the debt of the wife on account of her separate estate, he at the same time declaring his intention to forgive the debt, was held effectual for that purpose.²⁷

(4.) The most serious question has arisen, both in the English and American courts, in regard to what constituted a sufficient delivery of a chose in action to make a good donatio mortis causa. In one case,²⁸ the testator having frequently declared his

663. There seems no question that the delivery of the key of a warehouse as a symbol of the delivery of the goods contained therein, will be a good delivery, since this has repeatedly been held sufficient to avoid the effect of the statute against fraudulent conveyances of chattels to defeat or delay creditors. As to the necessity of full and perfect delivery, see *Huntington v. Gilmore*, 14 Barb. 243. The delivery must be made according to the nature of the subject-matter of the gift. *Hitch v. Davis*, 3 Md. Ch. Dec. 266.

²⁶ *M'Dowell v. Murdock*, 1 Nott & McCord, 237.

²⁷ *Gardner v. Gardner*, 22 Wendell, 526; *Bradley v. Hunt*, 5 Gill & J. 54. But see *Sims v. Walker*, 8 Humph. 503; *Miller v. Jeffress*, 4 Gratt. 472; *Merchant v. Merchant*, 2 Bradf. Sur. Rep. 432. The American cases all require actual and continued change of possession in order to perfect a donatio mortis causa. *Brown v. Brown*, 18 Conn. 410; *Meach v. Meach*, 24 Vt. 591. But there is some refinement as to what constitutes such delivery. In regard to choses in action all that seems requisite is, that the paper be handed over to the donee or to some one for his use, without any written assignment or indorsement, and that equally, whether the security be negotiable or not. *Sessions v. Moseley*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382. See also *Craig v. Craig*, 3 Barb. Ch. 76, 117, 118; *Dole v. Lincoln*, 31 Me. 422.

²⁸ *Bryson v. Brownrigg*, 9 Vesey, 1. In the case of *Smith v. Smith*, 2 Strange, 955, the donor lodged at the donee's house, and had plate and furniture there, and said that what he brought there he never intended to carry away, but gave directly to the defendant's wife. The donor when he went out of town, left the key of his rooms with the defendant. This was held such a mixed possession as not to perfect the gift. But this is clearly not a case of donatio mortis causa, although so called in the report, there being no peril of death at the time of the gift, and there is no effectual change of possession. Some of the cases seem to regard it as no sufficient delivery to create a valid donatio mortis causa, where the articles are already in the possession of the donee, or in that of a third person, and no change is made, although the third person is notified of the gift and agrees to keep it for the

intention * to give £200 to one of his daughters, in order * 330 to make her equal with the elder daughter, selected two securities, one a bond of £100 and the other a mortgage of £100, and directed his wife to take them out of the drawer, where they lay with other securities and papers of the testator, and to lay them distinctly by themselves in another drawer, as and for the property of such daughter, then a minor, which she did accordingly, and pointed them out to the donee as hers, and they were several times afterwards spoken of by the testator as her property. The testator in giving and in speaking of the securities afterwards, said, as they were good the money had better remain upon them till the daughter should marry. The securities remained in that position until the death of the testator, in the lower drawer of the bureau of the testator, of which the wife always kept the key. The interest on these securities, which arose after the gift, was, by the direction of the testator, paid to the donee as her own money. The widow, after the death of the testator, continued to keep the securities for the donee, at her request. *Sir William Grant* regarded it as no sufficient delivery, but as resting merely in the intention of the testator, and not as amounting to an executed gift.

(5.) There can be no question that a delivery to a third person for the benefit of the donee will be sufficient, provided the donor part with all control over the subject of the gift. But so long as

donee. But, upon principle, we think this cannot be maintained. As a general rule, mere notice to a third party, in whose custody a chattel is, of the transfer of the title, effects a corresponding change of possession; and where the bailee consents to hold the article for the donee there can be no question the possession is effectually changed for all purposes. This principle is recognized in *Waring v. Edmonds*, 11 Md. 424. It is in effect nothing less than the ordinary case of the assignment of a fund in the hands of a third party, or a bill of exchange drawn upon a special fund, or upon a general fund, or upon the credit of the drawer, after it has been accepted. See post, pl. 10, and notes. In *Dole v. Lincoln*, 31 Me. 422, it is held that the donor must part with all dominion over the property, which must be effectually transferred to the donee, so that if nothing more be done by the donor it will become the property of the donee from the time of the gift. In *Cutting v. Gilman*, 41 N. H. 147, it was held where the brother on his death-bed told his sister she might have his watch, chain, and seals, to remember him by, it being already in her charge as to winding it up, but remaining where it was placed at the beginning of his sickness, that there was no sufficient delivery to constitute a good *donatio mortis causa*.

the donor retains control over it, the holder is regarded as his agent, and the direction to keep it for the donee will not amount to any present delivery sufficient to create a *donatio mortis causa*.²⁹ Thus, in the last case cited, the donor having Dutch bonds, and the title of certain estates which he kept in a box, delivered the key of the box to J., in whose house he lived and with whom he was on terms of intimacy, and told a third person that the contents of the box belonged to J. The donor kept possession of the box, and directed J. from time to time to open it for him, and he continued to receive the dividends on the bonds. Just before his death, being in his eightieth year and in infirm health, he directed

his nurse to deliver the box to J., which she did, and he * 331 kept the * box till the death of the donor. Upon the box being opened, after the death of the donor, the envelope in which the bonds were contained was found to be addressed in the handwriting of the deceased to the wife and sisters of J., with the direction that it was to be delivered "unopened;" and attached to the envelope was a letter addressed by the deceased to the wife and sister, stating the proportion in which each was to have the benefit of the bonds, and stating in a postscript to J., that the writer took this course to avoid the legacy duty. This was held not to amount to a gift *inter vivos*, or to a *donatio mortis causa*. The Vice Chancellor said: — "I had some doubts, at first, whether the transaction might not be considered to amount to a *donatio mortis causa*. But to arrive at that conclusion I must be satisfied that there was a complete delivery in such circumstances as the law requires for that purpose. A mere delivery to an agent, in the character of agent for the giver, would amount to nothing. It must be a delivery to the legatee, or some one for the legatee." The learned judge said he considered the custody of J. the same on the last occasion as upon the former ones. And in a recent case,³⁰ where a father in his last illness and in contemplation of death, which occurred in a few days, made a writing giving certain specified portions of his estate to children and grandchildren, and delivered the writing to his sons, whom he charged with the execution of the trust, and to whom he also delivered the specified articles, it was held to be a valid *donatio mortis causa*.

²⁹ *Farquharson v. Cave*, 2 Colk. C. C. 356. See also *Dresser v. Dresser*, 46 Me. 48.

³⁰ *Kemper v. Kemper*, 1 Duvall, 401.

(6.) In an early case⁸¹ the gift consisted partly of cash notes * passing by delivery, and partly of promissory notes, * 332 not payable to bearer. The Master of the Rolls held the gift of the bank-notes a good *donatio mortis causa*, although made to the wife of the donor, and that the gift of the other note, being merely a chose in action, and one that must still be sued in the name of the executor, could not take effect as a *donatio mortis causa*, inasmuch as no property therein could pass by delivery. This latter proposition could not now be maintained.

(7.) There seems never to have been any serious question that bank-notes and such securities as pass by delivery, the same as money, and where the mere delivery passed the title as against all

⁸¹ *Miller v. Miller*, 3 P. Wms. 356. Some of the early American cases seem to have been decided upon the erroneous impression that a delivery to a third person, for the use of the donee, was not a sufficient delivery to create a good gift *mortis causa*. *Bowers v. Hurd*, 10 Mass. 427; *Windows v. Mitchell*, 1 Murph. 127. In the case of *Bowers v. Hurd* the court seems to have decided the case right by means of a double mistake. The donor made her promissory note to the donee, and then put both the note and the property to pay it into the hands of a third person for the donee. The court held the delivery insufficient, but the note itself good as a gift. But in fact, as the more recent decisions show, the delivery was sufficient to pass the property, but the promissory note of the donee was wholly invalid, as a gift, whether *inter vivos* or *mortis causa*. But see, as to a delivery in trust for the donee being held good, *Borneman v. Sidlinger*, 8 Shepl. 185; *Wells v. Tucker*, 3 Binn. 366. And see *Sims v. Walker*, 8 Humph. 503, where it is held that the executor and legatee, being requested by the testator to give a certain promissory note to a third person, created no trust, even where assurance was given that it should be done. But upon the strength of the rule in equity, that where one who would receive the estate defeats the making, or altering of the owner's will for that purpose, by an assurance that he will make provision for certain persons to whom such owner feels under obligation, and for whom he would have made provision in his will but for his confidence in such assurance, such person shall be decreed to make good such assurance; it was held by the New York Court of Appeals (*Williams v. Fitch*, 18 N. Y. 546), that where the trustee of a fund to which he would succeed in case of intestacy, prevented the making of a will in favor of a third party, by promising to hold the fund for the benefit of the intended legatee, the latter may recover its value as money had and received to his use; and that such a transaction would amount to a good gift *mortis causa* is here intimated as the inclination of the judge, "with some hesitation." Mr. Justice *Comstock* here says, with great propriety, that the trustee consenting to hold the funds for the donee was the same, to all practical purposes, as if they had been originally deposited for that end.

the world, would constitute a good gift mortis causa, sufficiently perfected by the mere act of delivery. In addition to the cases already referred to, that of *Jones v. Selby* seems to hold that a gift of a government security, and delivery of the same, will make a good donatio mortis causa.³²

(8.) The leading case of *Duffield v. Elwes*³³ first firmly established the rule in England that a bond and mortgage passed by mere delivery and a verbal declaration of gift, without any written assignment, and constituted a good donatio mortis causa.

* 333 It is * here declared, too, that the same rule applies to gifts mortis causa, as to any other species of gifts, in regard to the proper requisites to render them complete and effectual; and that if any thing remains to be done by the donor which a court of equity would not have compelled him to do during his life, it cannot be a good donatio mortis causa. In the recent case of *Veal v. Veal*³⁴ the question is carefully examined by Sir *John Romilly*, M. R., in regard to an unindorsed promissory note, and the learned judge, after commenting upon the early cases, and noticing the fact that Lord *Eldon*, in *Duffield v. Elwes*, first considered that a bond and mortgage would not so pass by delivery as to constitute a good gift mortis causa, concludes that notwithstanding the apparent embarrassing conflict in the authorities, it must be considered that the case of *Duffield v. Elwes*, and the more recent case of *Rankin v. Weguelin*,³⁵ where it was decided that an accepted bill of exchange, payable to the order of the donor, and unindorsed, constituted the proper subject of a good gift mortis causa when passed by parol gift and delivery; that these cases established the principle that an unindorsed promissory note would also pass in the same mode. The learned judge thus concludes:—
“I feel bound by this decision; and it does seem to be a more healthful state of the law, that the question whether it is a good donatio mortis causa should not depend upon a mere technicality,—

³² Prec. in Chanc. 300. But in this case the facts did not show any perfect delivery during the life of the donor, although that difficulty did not seem to have occurred to Lord *Cowper*, the Chancellor.

³³ 1 Bligh, N. s. 497; s. c. 1 Sim. & Stu. 239; s. c. by the name of *Duffield v. Hicks*, 1 Dow & Cl. 1. The decision of the inferior tribunals was reversed in the House of Lords; s. p. *Chase v. Redding*, 13 Gray, 418.

³⁴ 6 Jur. N. s. 527; s. c. 27 Beav. 303.

³⁵ 27 Beavan, 309; s. c. 29 Law J. N. s. Ch. 323 and note.

namely, upon whether a deceased person has actually written his name upon the back of a promissory note when he intended the donee to have the full benefit of it." But the same learned judge held, that where the donor told her servant to take the keys of her dressing-case and deliver her watch and trinkets which it contained to the plaintiff, and the servant took the keys, but kept them in her possession until after the death of her mistress, it did not constitute a good *donatio mortis causa*, for want of sufficient delivery.³⁶ And so late as April, 1861, the question came before the Court of Queen's Bench,³⁷ * in regard to a policy * 334

³⁶ *Powell v. Hellicar*, 5 Jur. N. S. 232; S. C. 26 Beavan, 261. The former cases were here carefully reviewed by the learned judge.

³⁷ *Witt v. Amiss*, 7 Jur. N. S. 499; S. C. 33 Beav. 619. *Barton v. Gainer*, 3 H. & N. 387, was here cited. This was the case of mortgage debentures upon a railway where the statute required them to be "transferred by deed duly stamped." It was held, that assuming the property in the mortgage debts did not pass by a parol gift and delivery of the instrument or security, nevertheless the executors of the donor could not maintain detinue for them against the donee. And in *Shower v. Pilck*, 4 Exch. 478, it was held that a mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the donee. Ante, n. 28, where the contrary is maintained. See *Cutting v. Gilman*, 41 N. H. 147. In a comparatively recent case, *Boutts v. Ellis*, 4 DeG., McN. & G. 249, it was decided that where a testator, four days before his death, said to his wife, "I am a dying man, you will want money before my affairs are wound up," and on the following day gave her a crossed check, and on the next day but one, remembering that the check was crossed, he asked a friend who visited him to take it and give the wife another for it, which the friend did, but his check was postdated, and the testator's check was paid to his friend before the testator's death, who, after the testator's death, gave the wife a check not postdated in lieu of the other, it constituted a good *donatio mortis causa*. The Lords Justices expressed themselves very clearly in favor of the validity of the gift *mortis causa*. Lord Justice Turner said, "I think that the gift of the original check was never revoked, and that it constituted a good *donatio mortis causa*." It seems to us this proposition may be regarded as somewhat questionable. A check, not accepted or certified by the officers of the bank to be good, may nevertheless pass to some extent as money, but it is in fact a mere promise of the drawer, and of no more force or validity than the promissory note of the donor or his unaccepted bill drawn upon his correspondent or banker. This check was in fact that very thing and nothing more; and if not paid during his life could not have properly been paid after. His cash account at his banker's must stand as it was at the time of his death, unless some check had been accepted before the death, as it seems to us. *Harris v. Clark*, 2 Barb. S. C. 94; S. C. 3 Comst. 93. The fact that his check had not only been accepted but actually paid before his death seems to us the decisive circumstance whereby this case is made a good gift *mortis*

of insurance, which with the deposit receipt had been given
 * 335 to the defendant by the intestate on her death-bed, * and

causa. It was virtually handing over to his friend a sum of money for his wife, to be delivered after his death. This is the view taken of the case by the Master of the Rolls. 21 Eng. Law & Eq. 337, and the only ground upon which the case is maintainable, as it seems to us. The case of *Lawson v. Lawson*, 1 P. Wms. 441, seems to have created some uncertainty upon this point. But that case is scarcely maintainable upon the grounds assumed by it, that delivering a check by the husband upon his goldsmith or banker, to pay his wife £100 for mourning, was an appointment or direction to his executors to expend that sum for his wife's mourning, as part of the expense of his funeral. The executors, no doubt, might do that of their own mere motion, and where the estate was ample and this seemed to be the desire of the testator, the court would hold it proper, and allow the executor for the expenditure. And that is all which is here decided. The Master of the Rolls places special stress upon the fact that the personal estate amounted to £8,000, and the husband's gifts and appointments for gifts by his executor amounted to but £200. Lord *Loughborough* said in *Tate v. Hilbert*, 2 Ves. Jr. 111, 121, after showing that the case of *Lawson v. Lawson* is very inaccurately reported, and that the opinion of the court is both contradictory and unsatisfactory: "That case is perfectly well decided. But upon that decision I cannot say that in all events drawing a cash note upon a banker is an appointment of the money in his hands." And the learned judge, in *Lawson v. Lawson*, seems himself to relent at his own declaration that the check was an appointment of the money, since if his wife had received it before the death of the donor, it is here doubted whether the gift would be valid. The learned judge, however, inclines to believe it might be good in that case even. And this but shows more clearly the great indefiniteness of the views here expressed. The great difficulty in the case of *Lawson v. Lawson* is that the wife was not to have any present control of the money. The check was made payable ten days after sight, and it appeared on inspection in the registrar's office, as stated in *Tate v. Hilbert*, that the donor had indorsed upon the bill that the £100 was for mourning, and directions were also indorsed in regard to the mourning for the children. All this shows very conclusively that the money was expected to remain in the hands of the banker until the death of the donor, and then be paid to the donee for this particular purpose. The check was then, in part, testamentary, and an appointment in regard to the expenditure of the money, in the course of administration upon his estate; and it seems to have been so regarded in the decision of the case, and in Lord *Loughborough's* comments upon it. This transaction then, according to the principle established by the recent decisions, was not a sufficient *donatio mortis causa*, because there was no separation of the money to the use of the donee during the life of the donor, and no consent of the drawee to hold it for her. The money remained, to all intents, in the custody of the donor's depositary, during his life, without any interest or control over it having attached in the donee, and this effectually defeated the gift, whether viewed as

the executors now brought detinue to recover the same. Lord Ch. J. *Cockburn* said: "We took time to consider whether we could distinguish between the case of a policy and a bond or mortgage. In point of principle we can see no difference." And the same question, between the same parties, was decided by the Master of the Rolls,³⁸ that money due upon a policy of insurance, and on a banker's deposit note, passes, as a *donatio mortis causa*, by delivery of the policy and note. And a certificate of deposit may pass as a *donatio mortis causa*, without indorsement by the depositor or payee.³⁹ But a delivery of a check upon the donor's banker, not presented before his death, was held not a good gift *mortis causa*.⁴⁰

(9.) It seems thus to be now fully settled in the English courts, *that not only negotiable securities, such as bank * 336 paper representing specie, and passing by delivery as money, but all other negotiable paper, including bills of exchange and promissory notes payable to bearer or indorsed in blank, together with government securities or public stocks issued by national and state authority, as well as the mortgage bonds and notes of railway and other corporations, made negotiable by delivery, either by statute or by custom, — but even promissory notes and bills not negotiated so as to pass by delivery, and also promissory notes not negotiable, bonds, mortgages, policies of insurance, and all other evidences of indebtedness which may be regarded as representing the debt, may by a *parol* gift, and the delivery of the paper by which the debt is evidenced, either with or without written assignment or indorsement, constitute a good gift *mortis causa*.⁴¹

(10.) But the promissory note or other contract of the donor by one *inter vivos* or *mortis causa*. Hence, we conclude, that no check or order, bill or note of the donor, merely, unless assented to by the drawee, during the life of the donor, will constitute a good gift *mortis causa*.

³⁸ *Amis v. Witt*, 33 Beav. 619; *Moore v. Moore*, 22 W. R. 729.

³⁹ *Westerlo v. De Witt*, 36 N. Y. 340.

⁴⁰ *Hewitt v. Kaye*, Law Rep. 6 Eq. 198; *Moore v. Moore*, 22 W. R. 729.

⁴¹ The early cases of *Miller v. Miller*, 3 P. Wms. 356, *Tate v. Hilbert*, 2 Ves. Jr. 111, 122, and some others, perhaps, which intimate the contrary doctrine, must now be considered as overruled. The same principle as to choses in action of third persons belonging to the donor constituting a good *donatio mortis causa*, has been universally adopted in the American courts. *Parish v. Stone*, 14 Pick. 198; *Grover v. Grover*, 24 Pick. 261; *Sessions v. Moseley*, 4 Cush. 87; *Borneman v. Sidlinger*, 3 Shepley, 429; *Turpin v. Thompson*, 2 Met. (Ky.) 420. But in one case a written assignment seems to have been deemed indispensable. *Overton v. Sawyer*, 7 Jones Law, 6.

which he undertakes to pay money either during his life, or out of his estate after his decease, will not constitute a valid gift mortis causa.⁴² This point has been so much discussed in the American courts, and is regarded as so entirely settled, that we need only refer to some few cases.⁴³ And a draft unaccepted is equally

* 337 incapable * of becoming the subject of a gift mortis causa.⁴⁴

But the American courts, as already stated, fully adopt the rule of the English courts, that any security for a debt of a third person may be made the subject of a *donatio mortis causa* by a parol gift and delivery merely.⁴⁵ This subject was very elaborately considered by the New York Court of Appeals, in an important case, after argument by the most distinguished counsel, in regard to an unaccepted draft for thirty thousand dollars, which was made by the donor during his last sickness, and sent to the donee, his sister, by mail, in a letter, wherein the donor said, — “For fear I should not reach home, as I am very feeble, I will give you an order on R. Clark & Co. for thirty thousand dollars, which they will pay you if I should be taken away, as I have funds in their hands to a large amount; and I hope you will make good use of the money.” The drawees, at the date of the draft, had funds in their hands more than enough to pay the draft. The draft was dated July 9, 1844, the donor died July 20, 1844, and the draft was presented

⁴² *Tate v. Hilbert*, 2 Ves. Jr. 111; s. c. 4 Br. C. C. 286; *Holliday v. Atkinson*, 5 B. & C. 501. But in *Roffey v. Greenwell*, 10 Ad. & Ellis, 222, it was held, that upon a promissory note in the form, — “I promise for myself and executors to pay F. H., or her executors, one year after my death, £300, with legal interest,” the note must be presumed to have been given for value, and that interest would be due from the date. *Brown v. Moore*, 3 Head, 671. So also of a bank-check unaccepted during the life of the donor. *Bank of Detroit v. Williams*, 13 Mich. 282.

⁴³ *Chase v. Redding*, 13 Gray, 418; *Parish v. Stone*, 14 Pick. 198, 203; *Holley v. Adams*, 16 Vt. 206; *Smith v. Kittridge*, 21 Vt. 238; *Craig v. Craig*, 3 Barb. Ch. 76 (overruling *Wright v. Wright*, 1 Cowen, 598); *Raymond v. Sellick*, 10 Conn. 480; *Copp v. Sawyer*, 6 N. H. 386; *Borneman v. Sidlinger*, 3 Shepley, 429; *Brown v. Brown*, 18 Conn. 410, where it is held that it is not important that the promissory note of a third person, in order to constitute a good gift mortis causa, should be made payable to bearer, or so indorsed as to transfer the legal title by delivery. See also *Waring v. Edmonds*, 11 Md. 424; *Flint v. Pattee*, 33 N. H. 520; *Carr v. Silloway*, 111 Mass. 24.

⁴⁴ *Harris v. Clark*, 2 Barb. Sup. Ct. 94; s. c. 3 N. Y. 93; *Coutant v. Schuyler*, 1 Paige, 316; *Shirley v. Whitehead*, 1 Ired. Ch. 130.

⁴⁵ *Grover v. Grover*, 24 Pick. 261; *Parker v. Marston*, 27 Me. 196; *Jones v. Deyer*, 16 Ala. 221.

and payment refused on the ninth day of December, 1845. The court held, that an instrument executed by the donor to the donee, operating as an assignment or transfer of the donor's funds in the hands of a third party, constitutes a sufficient delivery to uphold a gift mortis causa. But a draft of the donor (not accepted) for a specific sum, upon a third person who has in his possession funds of the donor, does not operate as an assignment or appropriation to the donee of the sum mentioned in the draft, and therefore is not valid as a gift mortis causa. It is here shown by the authorities, that a draft, payable out of a particular fund, operates as an assignment pro tanto of the funds in the hands of the drawee, and an accepted bill of exchange operates in the same way.⁴⁶ And admitting that a bank-check may become the subject * of a donatio mortis causa, although not accepted * 338 during the life of the donor, which, upon principle, seems very questionable,⁴⁷ it is here shown very conclusively, that an unaccepted bill of exchange cannot have that effect. It seems to us that, upon principle, there is no substantial difference between a check upon a particular fund, which does not exhaust it, and a draft upon the general credit of the drawee, which is always supposed to be on account of funds in the drawee's hands; neither operates to transfer any particular money to the donee, and is not, therefore, a valid donatio mortis causa.⁴⁸

⁴⁶ *Mandeville v. Welch*, 5 Wheat. 277, 286; *Tiernan v. Jackson*, 5 Peters, 580; *Weston v. Barker*, 12 Johns. 276; *Clarke v. Adair*, cited in 4 T. R. 343.

⁴⁷ *Lawson v. Lawson*, 1 P. Wms. 441.

⁴⁸ *Harris v. Clark*, 3 Comst. 93, 110-121. The question is here discussed in the most thorough manner, and is presented in all its bearings, both by court and counsel. In the case of *Gough v. Tindon*, 8 Eng. L. & Eq. 507, the donor before his death made two promissory notes, for £400 and £200 respectively, payable to the donee, who had been his housekeeper for some years, but left upon the birth of a child of which he was the father. These notes he enclosed in two letters addressed to the donee, and they were found among his papers after his decease. In one of the letters the note was said to be in consideration of the long and faithful services of the donee; in the other he said: "In addition to any sum I owe you, I enclose you £200 as a mark of my respect." The executors of the donor paid £200, after his death, on account of these notes, and promised in writing to pay the residue, but subsequently declined to do so; and it was held, in an action in favor of the donee, counting upon the notes and also upon an account stated with the executors, that the testator's estate was not liable in respect of the notes, as they had not been so delivered by him to the plaintiff, as to become perfected gifts during his life,

(11.) There seems to have been some question whether a deed of personal chattels would constitute a good *donatio mortis causa*. * Ch. J. *Ruffin*⁴⁹ intimates an opinion that such mode of conveyance will not be effectual to create a gift *mortis causa*, without delivery. But in the case of *Meach v. Meach*,⁵⁰ where the donor, being desperately sick, in prospect of death executed to his wife a deed in common form of all his real estate, and at the same time executed a separate deed of all his personal property, consisting of the stock on his farm and choses in action, both deeds being duly recorded, and the grantor remaining hopelessly sick for a little more than a month, and then dying; upon a bill for specific performance against the heirs and next of kin, together with the personal representative; it was held that the deed of the real estate could not be upheld, either as a post-nuptial settlement or a *donatio mortis causa*, but that the deed of the personal estate, the donee continuing to have the control and management of the same after the execution of the instrument, did constitute a good *donatio mortis causa*.⁵¹

and could not operate as testamentary dispositions, because not in conformity with the wills act. And a writing under seal and expressed to be made upon consideration of love and affection and of services performed by a deceased relative, directing the personal representative of the maker to pay the widow of such relative a sum of money, is testamentary, and will not form the basis of an action against such personal representative for refusal to comply with the direction. *Stone v. Gerrish*, 1 Allen, 175. The same facts seem requisite to constitute a delivery, and it is equally indispensable, whether the gift be made purely, *inter vivos*, or *mortis causa*. *McDowell v. Murdock*, 1 N. & McCord, 237; *Phillips v. McGrew*, 13 Ala. 255; *Chevallier v. Wilson*, 1 Texas, 161; *Richmond v. Yongue*, 5 Strobb. 46. But in a recent case, *Cooper v. Burr*, 45 Barb. 9, it seems to be considered, that an absolute gift of all the donor's property, in contemplation of death, in a lingering decline, which occurred in about six weeks, and handing over to the donee the keys of the trunks and drawers containing the property, are sufficient to create a good *donatio mortis causa*. But the delivery seems rather imperfect.

⁴⁹ *Smith v. Downey*, 3 Ired. Ch. 268.

⁵⁰ 24 Vt. 591. This case is very extensively examined in *Kenistons v. Sceva*, 54 N. H. 24, and most of the propositions involved in it affirmed.

⁵¹ It is here said that the case is "decided neither upon the sufficiency of the deed nor of the delivery of the property, which we feel justified in saying was such as was natural under the circumstances, where the husband had become so incapable of longer managing or controlling his property and business that it fell exclusively under the control of the wife, even before his death." In *Candor & Henderson's Appeal*, 27 Penn. St. 119, it was held

6. It was here held, too, that courts of equity might properly *interfere to carry into effect a donatio mortis * 340 causa, where the substance of the gift had been clearly proved, and the delivery was effectual to change the possession, either actually or constructively, and the only defect of title or possession consisted in the recovery of the debt or property assigned, as against the claim of some third party.⁵² It has

that the voluntary bond of the father to a trustee for the benefit of his minor child, is a valid gift, notwithstanding the father lived ten years afterwards, and made provision in his will for the child, which the guardian of the child refused to accept in lieu of the provision made in the bond; and that the executors of the father having paid the bond, should be allowed for the same in settling their account of administration. Some of the state courts seem not to have regarded the delivery of the evidence of indebtedness as a sufficient delivery of the debt. In *Pennington v. Gittings*, 2 Gill & J. 208, it was decided by the Maryland Court of Appeals, that the certificates of bank-stock, transferable only at the bank personally or by attorney, although indorsed in blank by the donor and delivered to the donee, did not constitute a good donatio mortis causa. And the same court held, that promissory note or certificate of profit, payable to the order of the donor and delivered to the donee, did not constitute a good gift mortis causa. *Bradley v. Hunt*, 5 Gill & J. 54. These cases seem to have proceeded upon the ground that the title of the donee must be made perfect at the time of the gift, leaving nothing more to be done either by the donor or his representative, in order to give the donee the complete benefit of the gift. But this proposition could not now be maintained, and the cases would not probably be followed. In 1 Wms. Exrs. 733, it is said, — “It has never been decided whether a donatio mortis causa may be *by deed*, without delivery of the things contained in it. Lord *Hardwicke*, on two occasions (*Ward v. Turner*, 2 Ves. Sen. 444; *Johnson v. Smith*, 1 id. 314), seems to have expressed an opinion in the affirmative. Lord *Rosslyn*, in *Tate v. Hilbert*, 2 Ves. Jr. 120, observed that perhaps it might not be difficult to conceive, that this sort of donation might be by deed or writing, without delivery. But there has already been occasion to show that, in the ecclesiastical courts, such instruments are considered as testamentary, and are admitted to probate as such; and it would seem that in the temporal courts they could not, unaccompanied by delivery, be allowed to operate as donations mortis causa.” Ch. J. *Gibson* took a similar view in *Nicholas v. Adams*, 2 Whart. 17, 24. And we are not prepared to say this view, that the deed of the donor merely is no sufficient delivery to create a good gift mortis causa, may not ultimately prevail.

⁵² *Harris v. Clark*, 2 Barb. Sup. Ct. 94, 98, where *Gridley, J.*, said: “In gifts inter vivos, a court of equity will not compel the donor to complete his gift, or an executor to complete the gift of his testator, whereas in the case of gifts mortis causa, the donor may successfully invoke the aid of a court of chancery for that purpose.”

been held, too, that where the gift mortis causa consists in the transmission of a chose in action, it is competent for the donee to maintain an action, in the name of the executor or administrator of the donor, to recover the amount due.⁵³

7. It was a rule of the civil law, that a donatio mortis causa might be made subject to a trust or condition, and the inclination of the courts seems to be in the same direction, both in England and America.⁵⁴ This point seems to have been expressly decided in the case of *Hills v. Hills*.⁵⁵ Lord *Abinger*, C. B., here said:

“Property may be given by way of donatio mortis causa, although the gift be made for a special purpose and coupled with a trust.” And *Parke*, B., said: “It follows, therefore, that a gift made for a special purpose, and coupled with a trust, may be good as a donatio mortis causa.”

8. The whole subject of gifts mortis causa is seriously questioned by Lord *Eldon* in the House of Lords, in the leading case of *Duffield v. Elwes*,⁵⁶ where his lordship said: “Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if among those things called improvements this donatio mortis causa were struck out of the law altogether, it would be quite as well.” And in further discussing the point of what aid courts of equity would afford the donee, it is here said: ⁵⁷ “In a case where a donatio mortis causa has been

⁵³ *Bates v. Kempton*, 7 Gray, 382; *Shaw*, Ch. J., in *Chase v. Redding*, 13 Gray, 418; Lord *Eldon*, in *Duffield v. Elwes*, 1 Bligh, n. s. 530.

⁵⁴ *Hambrooke v. Simmons*, 4 Russ. 25; 1 Story, Eq. Jur. § 607 e. The same rule prevails in the American courts. *Borneman v. Sidlinger*, 8 Shepl. 185; s. c. 3 Shepl. 429. But *Thompson v. Dorsey*, 4 Md. Ch. Dec. 149, seems to hold, that a gift, through the intervention of a third party, is not valid, either inter vivos, or mortis causa. But there can be no question one may deliver a gift to one person for the benefit of another, and it will be entirely valid. Ante, pl. (5).

⁵⁵ 8 M. & W. 401; *Blount v. Burrow*, 4 Br. C. C. 72.

⁵⁶ 1 Bligh, n. s. 533.

⁵⁷ Ante, n. 52. The cases in regard to a bond secured by mortgage, being the proper subject of donatio mortis causa, are here very carefully reviewed by Lord *Eldon*. The great doubt in his lordship's mind, which he confesses to having expressed to the Vice-Chancellor before the decision of the case below, seems to have turned a good deal upon the idea that the security was in the nature of real estate, which could not become the subject of this species of gift. It seems to have been supposed that such an interest could not have been conveyed by parol merely, since that would be in conflict with the statute of

carried into effect by a court of equity, the court of equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that the donee has a right to call on a court of equity, and as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents."

9. We have already intimated that the donee in this species of gift derives his title directly from the donor, and not in any sense from the executor or personal representative of the donor.⁵⁸ The point is thus summed up by Mr. Justice *Story*:⁵⁹ "The delivery in the case of a mortgage is, therefore, treated, not as a complete act passing the property, but as creating a trust, by operation of * law, in favor of the donee, which a court of equity * 342 will enforce in the same manner as it would the right of the donee to a bond. In short, in all cases in which the donatio mortis causa is carried into effect by a court of equity, the court has not considered the interest as completely vested by the gift; but that it so vested in the donee, that the donee has a right to call on a court of equity for its aid; and in case of personal estate, to compel the executor or administrator of the donor to carry into effect the intention manifested by the person whom he represents; as, for example, if the donation be a bond, to compel the executor or administrator to allow the donee to use his name in suing the bond, upon being indemnified, because it is a trust for the donee," thus adopting substantially the language of Lord *Eldon*, already quoted.

10. It seems to be well settled, as before intimated, that one may remit a debt due him by way of donatio mortis causa by a formal surrender of the securities, with a verbal declaration of intention to that effect. As where a father, having lent his son a sum of money, took a deposit of the title-deeds of an estate, together with a bond. The son afterwards borrowed the deeds of his father, and mortgaged the estate to another, without the knowledge of his

frauds. But it is obvious no difficulty of this kind need arise, since the transfer of the debt carries the security, which is a mere incident. 1 *Story*, Eq. Jur. § 607 a; *Hassell v. Tynte*, Amb. 318; *Richards v. Symes*, 2 Atk. 319; s. c. *Barnard*. 390; *Martin v. Mowlin*, 2 Burrows, 969.

⁵⁸ *Gaunt v. Tucker's Executors*, 18 Ala. 27.

⁵⁹ 1 Eq. Jur. § 607 a; s. p. *Parish v. Stone*, 14 Pick. 198, 203, 204; *Grover v. Grover*, 24 id. 261, 266.

father, who, during an illness from which he never recovered, gave his son the bond, saying, — “Take this, but do not wrong your children, and do not mortgage your property,” and it was held that this constituted a good *donatio mortis causa* for the benefit of the son alone.⁶⁰ And where one lent another £500, and took the following security: — “Received of A. £500, to bear interest at four per cent,” and when dangerously ill gave the document to her servant, saying that she wished the debt to be cancelled, it was held that this was a good *donatio mortis causa*.⁶¹

11. It has been made a question, recently, whether this species of gift is not so far of a testamentary character as to be avoided by coming in conflict with the present English wills act,⁶² which requires all testamentary dispositions of estate, personal as well as real, to be by writing, and with certain prescribed formalities. But the English courts have nevertheless upheld such gifts,⁶³ and they are expressly recognized in a later English statute affecting

* 343 revenue. * In some American cases this point has been presented. It was held in Pennsylvania,⁶⁴ that where such a gift was made to embrace all the donor's estate, consisting of numerous and diverse articles, it could not be maintained, since it was an attempt to make a will in a form not allowed by the statute. Mr. Justice *Lowrie* here says, that *donationes mortis causa* were treated as exceptions, which should not be extended by way of analogy so as to embrace the whole field occupied by wills. But in a later case in the same state,⁶⁵ it was decided that this rule will not embrace a case where the whole or the principal part of the donor's estate consisted in the thing given, which was here a bag of gold-dust and coin. And in Vermont this question was examined with some care, and the conclusion arrived at that the present state of the law will not allow us to define any limits in regard either to the absolute or comparative amount of property which may be transferred in this mode.⁶⁶

12. There can be no question of the right of the donor, as before suggested, at any time, to revoke such gifts, by any act clearly

⁶⁰ *Meredith v. Watson*, 23 Eng. Law & Eq. 250.

⁶¹ *Moore v. Darton*, 7 Eng. Law & Eq. 134; s. c. 4 DeG. & Sm. 517.

⁶² 1 Vict. ch. 26.

⁶³ *Moore v. Darton*, 4 DeG. & Sm. 517.

⁶⁴ *Headley v. Kirby*, 18 Penn. St. 326.

⁶⁵ *Michener v. Dale*, 23 Penn. St. 59.

⁶⁶ *Meach v. Meach*, 24 Vt. 591; post, pl. 15 and n. 74.

evinced such intention; and it has accordingly been held, that any act, such as the subsequent birth of a child, where it will operate to revoke a will, should have the same effect in regard to a gift mortis causa.⁶⁷ But the bequest of all the testator's property to another will not operate to revoke a donatio mortis causa, since the will only becomes operative at the death of the testator, when the gift also becomes irrevocable.⁶⁸

13. There seems to be no question of the right of married women to receive this species of gift to their separate use, as the cases already referred to abundantly show; and married women may dispose of their estate in this mode, to the same extent as they are allowed to do by will in the place of their domicile.⁶⁹ And a gift to the wife by a stranger is presumed to have been intended for her * separate use.⁷⁰ And a husband may make such * 344 gifts directly to the wife.⁷¹

14. This subject was considerably discussed in a recent case in the Surrogate's Court, New York.⁷² It was here considered, that the true policy of the law should be to discourage such gifts; that they could only be established upon the clearest, most satisfactory, and circumstantial proof; and that where the gift was by parol, the proof of an intentional delivery on the part of the donor, and with a view to perfect the gift, should appear; and that the mere fact that the thing went into the possession of the donee, even by the act of the donor himself, was not enough; nor will the mere intention to make such a gift be sufficient to render it effectual, however clearly established.

⁶⁷ *Bloomer v. Bloomer*, 2 Bradf. Sur. Rep. 340. As to the revocable character of gifts mortis causa, see *Parker v. Marston*, 27 Me. 196. It seems that recovery from the impending prospect of death and restoration to health, is regarded as evidence of revocation. *Weston v. Hight*, 5 Shepl. 287.

⁶⁸ *Nicholas v. Adams*, 2 Whart. 17; *Jones v. Selby*, Prec. in Ch. 300; *Ham-brooke v. Simmons*, 4 Russ. 25.

⁶⁹ *Jones v. Brown*, 34 N. H. 439.

⁷⁰ *Howard v. Menifee*, 5 Pike, 668.

⁷¹ *Meach v. Meach*, 24 Vt. 591; *Gardner v. Gardner*, 22 Wend. 526; *Whitney v. Wheeler*, 116 Mass. 490. So also may the wife make such gifts to the husband, either for himself or in trust for others. *Caldwell v. Renfrew*, 33 Vt. 213. See also *Baxter v. Bailey*, 8 B. Mon. 336, which is the case of a deed of gift by the father to his daughter, granted during his last illness, in the presence of the family and was upheld; s. p. *Thompson v. Thompson*, 12 Texas, 327.

⁷² *Delmotte v. Taylor*, 1 Redfield's Sur. Rep. 417.

15. It seems, as already stated, to have been considered in some cases, that a donatio mortis causa is invalid, if it embraces the whole of the debtor's personal estate.⁷³ But we had occasion to examine this point in a case of importance, and where the estate was very considerable, and we were not able to perceive any ground upon which the right to dispose of personal estate in this mode could be restricted, either absolutely or relatively, to the amount of the donor's estate.⁷⁴

⁷³ *Headley v. Kirby*, 18 Penn. St. 326 ; s. c. 1 Am. Law Reg. 25.

⁷⁴ *Meach v. Meach*, 24 Vt. 591. Our own views are here thus stated : " One cannot but feel, that it was never properly intended to apply to a general disposition of a large estate, to the utter subversion of the statute of wills. And still, when we attempt to limit its operation, we encounter embarrassments not readily disposed of. If one may remit a debt of £500 (about \$2500) by the simple act of delivering the receipt for it to a third person, a servant attending the death-bed, with a general expression of desire, in the briefest words, that the debt should be cancelled (which was the case of *Moore v. Darton*, 7 Eng. Law & Eq. 134) 4 DeG. & Sm. 517, and which was sustained without difficulty by a distinguished English Vice-Chancellor, we can scarcely be expected to say that twice that amount, therefore, is not a good donatio mortis causa. And although in practice with us this mode of final disposition of property has oftener been confined to some favorite articles of personal attire or ornament, perhaps, like watches and jewels, yet an examination of the cases will show a wonderful variety in the character and extent of property disposed of in this mode, often including all one possesses, consisting of the largest extent and variety of property, both in possession and in action ; and thus in fact amounting to a nuncupative will. And still I find no case, except the late case in Pennsylvania, where any attempt has been made to limit its operation, on account of the comparative or absolute extent of the property disposed of. And the more I have reflected upon the subject, and compared the cases, with a view to evolve some rational and practicable principle of limitation to the extent of its operation, the more I have felt constrained to declare that it cannot be done by any powers of abstraction or generalization which my short sight is able to command. If the servant, whose whole estate consists of a few hundred dollars, balance of earnings in the hands of his employer, and five pieces of property in possession, is to be allowed, in his last sickness, to dispose of it to five different persons by mere words, and by committing the entire evidence of debt to a fellow-servant, which seems now to come within all the best considered cases upon that subject, it would seem invidious to hold, that when the property amounts to thousands, composing the principal estate of a substantial householder, it could not therefore be conveyed in this mode. And if the man of great worldly possessions, who has executed his will in the most reverent formality, may, when death presses him sore, modify that disposition, which alone the written law of the land recognizes, by taking from his secret drawer

* 16. Much of the foregoing chapter was written without * 345 having the very latest cases before us. But we have not been able to find any essential qualification of the doctrines stated, in any of the more recent cases, English or American. The question came before the Lords Justices in the recent case of *Mitchell v. Smith*,⁷⁵ where the facts were, that the donor, some months before his death, gave his nephew, who was residing with him, certain promissory notes, of which he was the owner and payee, with the words, "I give you these notes," adding soon after, that his nephew should have them at his death, but that he wished to be master of them as long as he lived. On the same day each note was indorsed with these words: "I bequeath, pay the within contents to S. or his order, at my death," and this indorsement was signed by the testator, and attested by a * single witness; and it * 346 was held that as this was intended only as a testamentary disposition, which failed through informality, the notes must be regarded as part of the testator's estate. It was here said, that the indorsement and delivery of a promissory note, to be effectual as a *donatio mortis causa*, must be such as will enable the indorsee himself to indorse and negotiate it.

17. In a later case⁷⁶ before Vice-Chancellor *Stuart*, where the testator, whilst confined to his room of the illness of which he died, gave to his son certain bank-shares, and on the same day wrote to the manager of the bank, directing that the shares should be transferred to his son, but before any transfer was made he died; it was held that, the gift not being perfected by the transfer of the shares, it fell into the mass of the estate.

18. The subject of such gifts is somewhat learnedly discussed in the case of *Merchant v. Merchant*, before referred to,⁷⁷ and the point resolved, that all gifts, made during the last sickness, and

securities for debt to the amount of thousands of dollars, and making an irrevocable disposition of them after death by the brief words 'I give,' and the simple act of delivery to the wife, which in law is a delivery to himself, — a mere change from one hand to the other, — it would certainly not be easy to say that one whose whole property did not amount to one tithe of that sum, or if it did exceed it by hundreds of dollars, could not do the same. And yet it will be noticed, that the last case supposed is the well-considered and constantly recognized case of *Miller v. Miller*, 3 P. Wms. 356."

⁷⁵ 10 Law Times, n. s. 801.

⁷⁶ *Lambert v. Overton*, 13 W. R. 227; s. c. 11 Law Times, n. s. 504.

⁷⁷ 2 Bradf. Sur. Rep. 432.

from which the donor did not expect to recover, are, by presumption of law, to be regarded as made mortis causa, and are revocable at the mere option of the donor, at any time before his decease, whether he recover or not. And it was held in another case, in the same state,⁷⁸ where the words or acts claimed to constitute a gift mortis causa, are in themselves ambiguous, that extrinsic circumstances, such as the relation between the parties, and their interest in and obligations towards each other, may be shown in explanation of the transaction. And in a later case,⁷⁹ where one being conscious that death was near, requested some one to give her a parcel, from which she took money with which she requested a friend to pay certain debts, and handed the rest to the same person, including money and a certificate of deposit, unindorsed, saying that she gave it to her for her own use; it was held not sufficient to make a good gift of the certificate.

* 347 * 19. When a gift is claimed to have been made by one since deceased, to come out of his estate, it will usually involve the consideration of one of two or more theories.

(1.) Was it a perfected gift during the life of the deceased? This may be effected in two modes, either absolutely or conditioned to become final upon the death of the donor. The former is called a gift, or *donatio inter vivos*, because it becomes perfected and irrevocable *during the life of the parties*. The latter is called a gift or *donatio mortis causa*, because, although perfected and complete in every respect, so far as the delivery to the donee is concerned, the same as the former, it is nevertheless, in its essence, subject to two very important conditions: 1. That it may at any time be recalled

⁷⁸ *Smith v. Maine*, 25 Barb. 33.

⁷⁹ *Westerlo v. De Witt*, 35 Barb. 215. It was held a sufficient delivery to a married woman to perfect a gift inter vivos, that the donor—who had just bought the same, being household furniture, upon a chattel mortgage, made by the husband—said to the donee, after pointing out certain of the articles: “I give you these, and all the property I have purchased this day,” the furniture remaining in the use of the family the same as before, the husband and wife living together in the house. *Allen v. Cowan*, 23 N. Y. 502. But a letter drawn by the husband and signed by the wife, a few days before her decease and when she was rapidly failing, and addressed to a bank, requesting that funds she had in the bank should be transferred into the name of her husband, stating that her health was much worse and she feared she might not be able to draw for money when needed, to which the husband added that his wife was very ill, and would need money from time to time, was held not to amount to a gift mortis causa. *First Nat. Bank v. Balcom*, 35 Conn. 351.

by the donor, upon his mere election to do so. 2. It ceases to have any operation, if the donor recovers from his then impending malady, the gift being made, in prospect of death, from his then present illness.

(2.) The gift may be, in its terms, made dependent upon the event of the donor's decease, and at the same time not be made in prospect of death by the donor's then present illness. As the donor may give his son or nephew a horse or watch, to remain the donor's during his life, and be subject to any modification or other disposition during his life, but to become the property of the donee upon the decease of the donor, without having made any other disposition of the same. This is not a gift at all, since a gift *inter vivos* must be absolute and irrevocable, from the time of the delivery, which is the pivot upon which all gifts turn, but it is merely a testamentary disposition of the property, revocable during life, and, unless made in conformity with the statute in regard to the execution of wills, cannot be carried into effect.⁸⁰ So that in all those cases the inquiry is :

(1.) Was this an absolute and irrevocable and unconditional gift, carried into effect, before the decease of the donor, by full and complete delivery ? if so, it will have effect as a gift *inter vivos*.

(2.) If the case does not amount to this, the next inquiry will be, Was it a perfected and complete gift, as before stated, with the exception that, being made in prospect of death, it was revocable at any time before death, and would become inoperative upon the recovery of the donor ?

* (3.) If it falls short of this also, it must come into the * 348 category of testamentary dispositions, and cannot be carried into effect after the death of the donor, unless executed by him in writing in conformity with the statute of wills. But see *Adams v. Broughton*.⁸¹

20. In an important English case⁸² it is declared, that, to con-

⁸⁰ *Lee v. Luther*, 3 W. & M. 519.

⁸¹ 13 Ala. 731.

⁸² *Cosnahan v. Grice*, 15 Moore, P. C. C. 215. This case was as follows : A person having a considerable amount of bank-notes concealed in her stays, and being on her death-bed, took the stays, and said to G., her cousin, who was standing by her bedside, that she was going to give her these, at the same time holding the stays in her hands. G. took them, and put them at the foot of the bed ; but on deceased saying, " Don't leave them there, keep them, take them, keep them, and take care of them," G. asked for the key of a box

stitute a good gift mortis causa, the proof must be clear of the donor's intention to make an absolute gift in contemplation of death; that the burden is necessarily upon the donee; and there are so many temptations and such facility for unscrupulous persons to pretend death-bed donations, that there is always danger of having an entirely fabricated case set up; and even
 * 349 where all * suspicion of fraudulent contrivance is dispelled, it is so easy to mistake the language of a dying person, and either through the substitution of some slightly different words, or the false construction of those actually used, to convert an intended benefit, of some very limited character, into an absolute gift of great value, that no case of this kind ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character.

21. A direction in writing to have a bond delivered to the obligor, or cancelled upon his executing a discharge of all demands, and that if he refused to do so, the bond should be retained and used

in the room belonging to the deceased, which the deceased handed to her; thereupon G. locked them up in the box. Immediately after deceased's death, G. ripped up the stays, took out the bank-notes, and replaced the stays in the box. She took away from deceased's house a watch and several trinkets belonging to deceased of which she gave no immediate account, nor did she mention the amount she had found in the stays. Held, that, having regard to the looseness of the expressions used by deceased when she handed the stays to G., the evidence of which was itself unsatisfactory, coupled with the conduct of G. in taking other property of deceased, the circumstances could not be considered to amount to such a delivery as constituted a good *donatio mortis causa*. And another case is somewhat similar in principle: where the wife testified that the testator, shortly before his death, delivered to her a book containing £600 in bank-notes, and informed her that they were for her use and at her disposal, and that she had expended some of them before his death; and the wife's niece testified that about eleven days before the testator's death, he, in the witness's presence, delivered to his wife a note-case, containing bank-notes, how many she was ignorant, telling her if any thing happened to him the contents of the case were hers; and that on the same day, after returning from the bank, the testator gave to his wife other bank-notes, saying, "These are to be yours also," which the wife put into the case; that the testator was in indifferent health at the time, but sensible of what he was doing, and that she understood the notes to have been given the wife conditionally upon the testator's death: Held, that a *donatio mortis causa* was not sufficiently proved, the descriptions of the manner of the gift not agreeing. *Walter v. Hodge*, 2 Swanst. 92. See also *Hebb v. Hebb*, 5 Gill, 506.

as a set-off to any suit the obligor might institute on his counter claims, but that it should never otherwise be put in suit against him, there having been no delivery of the bond, was held not to amount to a *donatio mortis causa*, but that it was a discharge or forgiveness of the debt.⁸³ But the distinction seems without much foundation.

22. A gift may become effectual under the law of the state where it is transacted, although not perfected in conformity with the law of the place of the domicile of the donor at the time of his decease. But the burden is upon the donee to show that fact, and on failure to do so, its validity must be determined by the general rules of law applicable to the subject, in the place of domicile.⁸⁴

23. Where a gift, *mortis causa*, is conditioned to be in full of the donee's share in the donor's estate, and the donee still claims a share in the estate, she will be required to account for the amount of the donation.⁸⁵

24. But an unconditional gift, *mortis causa*, although subject to claims of creditors,⁸⁶ is not to be taken into account in the distribution of the estate.⁸⁷

25. A mere direction to one's agent to retain £300, a part of the money in his hands belonging to the donor, as a gift, although made in the immediate prospect of death, and acquiesced in by the executors for seven years, is not a valid gift *mortis causa*.⁸⁸

26. It has been held that the delivery of a savings-bank pass-book, containing entries of money deposited, with a gift of the same, *causa mortis*, is sufficient to pass the money.⁸⁹ But the gift of a check payable to bearer was held not sufficient to pass the money, as a gift *mortis causa*.⁹⁰ But the gift of money in a savings-bank, deposited there by the donee as the agent of the donor, the donee at the time having the book in his possession, without any act done to constitute a delivery of the book or the money, was

⁸³ *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400. But see *Linthicum v. Linthicum*, 2 Md. Decis. 21.

⁸⁴ *McCraw v. Edwards*, 6 Ired. Eq. 202.

⁸⁵ *Currie v. Steele*, 2 Sandf. S. C. 542.

⁸⁶ *Chase v. Redding*, 13 Gray, 418.

⁸⁷ *Gaunt v. Tucker's Executors*, 18 Ala. 27 ; *Bouts v. Ellis*, 21 Eng. Law & Eq. 337.

⁸⁸ *Walsh v. Studdart*, 4 Dru. & War. 159.

⁸⁹ *Tillinghast v. Wheaton*, 8 R. I. 536.

⁹⁰ *Rhodes v. Child*, 64 Penn. St. 18.

held not sufficient to pass the money.⁹¹ And this seems to us more in accordance with the general current of the decisions than the case from Rhode Island just referred to.

27. It would seem that mere naked declarations of the donor, made to third parties after the alleged gift, are not competent evidence to prove it.⁹² But declarations made by the donor to the alleged donee, whether before or after the gift, may be received as corroborative proof.⁹³

28. So where a soldier, at home upon furlough, deposited money with a friend upon his giving him a writing to return the money if the soldier came home alive, and if not to pay it to the soldier's infant sister, it was held a good gift mortis causa to the sister, the brother having died before his return home again.⁹⁴

29. In a recent English case⁹⁵ the question of making gifts mortis causa of securities is much discussed, and the unsatisfactory state of the English decisions commented upon. It is there held that certificates of railway shares could not be thus given by the delivery of such certificates; but that a bank deposit note or certificate might be so given. We conjecture the appellate courts may hold both good subjects of such gifts. Such seems to be the tendency of modern decisions.

⁹¹ *French v. Raymond*, 39 Vt. 623; *McGrath v. Reynolds*, 116 Mass. 566.

⁹² *Rockwood v. Wiggin*, 16 Gray, 402.

⁹³ *Dean v. Dean*, 43 Vt. 337.

⁹⁴ *Baker v. Williams*, 34 Ind. 547. It will not affect the validity of a gift mortis causa, that the donee takes it in trust for others, upon conditions subject to future contingencies. *Clough v. Clough*, 117 Mass. 83.

⁹⁵ *Moore v. Moore*, L. R. 18 Eq. 474; ante, §§ 38, 40.

* CHAPTER XIII.

* 350

THE ADMINISTRATION AND MARSHALLING OF ASSETS.

1. These questions generally arise, not among creditors, but among other claimants to the estate.
2. It often becomes necessary to give a legatee or devisee, or the heir, the claim of a creditor, by way of indemnity.
3. Courts of probate pursue the law, in the distribution of assets. Courts of equity do not always.
- n. 1. Authorities referred to where the distinction between legal and equitable assets is discussed at length.
4. Courts of equity regard all debts equally entitled to payment. Equality is equity.
5. They enforce this rule upon the ground that he who invokes their aid must submit to their rules.
6. Trust estates, capable of identification, do not constitute assets.
7. The direction in the will that all just debts shall be paid will not affect the order of distribution.
8. The views of Lord Chancellor *Campbell* upon this point.
9. The testator has the right to direct what fund shall pay debts.
10. Many eminent judges have regretted that this should depend upon any thing short of an express direction.
11. The rights of creditors cannot be affected by any direction of testator.
12. Estates not transmissible except by way of appointment do not become assets until after such appointment.
13. Giving legatees and others the rights of creditors by way of indemnity.
14. The marshalling of assets among different classes of creditors.
- 15 and n. 20. The mortgagee of real estate entitled to a dividend upon his whole debt, without relinquishing his security. Query.
16. The chief importance of this inquiry is in regard to conflicting claims arising between the different legatees and devisees, or between them and creditors.
17. Descended estates are liable before those devised.
18. Statement of the rules of law applicable to the subject more in detail.
 - (1.) The personal estate the primary fund for the payment of debts.
 - (2.) Real estate specifically set apart for the payment of debts.
 - (3.) Real estate descended to the heir.
 - (4.) Real estate devised.
- n. 33, 34. Some American cases discussed. Order of payment of legacies.
19. If the executor pay debts out of his own money, he may reimburse himself out of any assets in his hands legally applicable to the payment of debts.
20. Devise of real estate, even in the residuary clause, regarded as specific.
21. Question, as between general pecuniary legatees and the residuary legatee.
22. The mode of charging legacies upon real estate.
23. As between a specific devisee of real and personal estate.

- * 351 * 24. The question as between a specific devisee of real estate, and real estate passing by the residuary clause, finally determined in the House of Lords.
- 25. Decision of Sir *J. Romilly* upon the point.
- 26. Where an incumbrance rests upon an estate, at the time of purchase, the land is the primary fund for its payment. Other points in American cases.
- 27. The same rule extends to all estates devised or descended.
- 28. It is not sufficient to shift the burden, that the testator might have been compelled to pay the debt.
- 29. By statutes in England and New York all estates pass by devise or descent, subject to all incumbrances.
- 30. The degree of certainty required to change the legal intendment as to the burden.
- 31. Judge Hare's statement of the rule. Exceptional cases in America.
- 32. The devisee of real estate entitled to have mortgage upon it, created by deviser, paid out of the personal estate.
- 33. Lands specifically devised not to be charged with payment of legacies until lands descended are exhausted.
- 34. One, having lien on more than one fund, must go against that upon which others have no lien.
- 35. Order in which creditors may demand payment of the administrator and distributees.
- 36. A claimant where rightful fund is lessened by the payment of other claims, may be subrogated, &c.
- 37. Contracts by the ancestor for permanent erections on land must be paid for out of personalty.
- 38. The pure personalty may, by direction of the will, be applied in a particular direction.
- 39. The wife who has mortgaged her separate estate, to secure the husband's estate, may claim to stand *pari passu* with the other creditors, for exonerating it.
- 40. Charging debts "primarily and exclusively" on certain real estate will exonerate the personalty.
- 41. Cannot marshal property belonging to estate, not within the forum.

§ 43. 1. THE administration and marshalling of assets is a subject of interest always, and sometimes of considerable difficulty and uncertainty. It may be assumed as an universal rule in the American courts, and the rule is the same now in England, that all estate of a deceased person, of every kind, is liable for his debts, and no controversy therefore can arise between the creditors and other claimants to an estate. But these questions now arise chiefly between different claimants to the residuum of the estate after the payment of the debts.

2. And in many cases where the creditors of an estate enforce the collection of debts against specific property, either real or personal, upon which they have a specific lien by way of mortgage, or for an unpaid balance of purchase-money, it becomes necessary, in

order to indemnify the party to whom such property is specifically bequeathed in the will, or upon other grounds, to give such party, * whose general rights are thus curtailed, an equitable contribution from others interested in the distribution of the estate, so as thereby more fully to equalize the burden which, in equity, rested equally upon every portion of the estate, but had been unequally enforced, against different portions of it. We shall recur to this subject again.

3. Courts of probate, although possessing, in a limited degree, equity powers, ordinarily pursue those rules which obtain in courts of law in the distribution of legal assets. But courts of equity, while they do the same as to what are regarded as strictly legal assets, as an equity of redemption, for instance, do not feel bound to apply the same rule always to equitable assets, it has been said.¹

4. Courts of equity, while they do not interfere to hinder creditors having priority at law from enjoying the full benefit of such right in the distribution of the legal assets, will, after such creditors have partially satisfied their debts out of the legal assets, so apply those purely equitable assets which are exclusively under their own control, as to countervail the advantage thus attained through such legal priority, by paying up other creditors not entitled to the same legal preference, until the creditors are all thus made equal.² Courts of equity consider a man equally bound to pay all his debts,³ upon one of the maxims of such courts, that equality is equity.

5. The courts of equity claim to enforce this departure from the strict requirements of the law, in the distribution of estates among creditors, upon the same ground that they often require a party coming there for relief to do an act not strictly required at law,

¹ 1 Story, Eq. Jur. §§ 553, 554; *Sharpe v. Earl of Scarborough*, 4 Vesey, 538, overruling *Cox's Creditors*, 3 P. Wms. 341; *Hartwell v. Chitters*, Amb. 308; ante, § 32, pl. 17. In *Pardo v. Bingham*, Law Rep. 6 Eq. 485, it was decided that no priority resulting from the law of the place of contract could be recognized in England in administering equitable assets in the courts of equity.

² 1 Story, Eq. Jur. § 557; *Sheppard v. Kent*, 2 Vern. 435; *Haslewood v. Pope*, 3 P. Wms. 323; *Deg v. Deg*, 2 P. Wms. 412; *Morrice v. Bank of England*, Cas. temp. Talb. 217, 220.

³ *Morrice v. Bank of England*, Cas. temp. Talb. 217, 219, 220, 221; 1 Story, Eq. Jur. § 557; 2 Jarman, 544.

but which courts of equity regard as equitable, upon the principle that he who asks equity, must first do equity.⁴

* 353 * 6. Trust estates devolving upon an executor or administrator, where the trust property had been kept separate from his other property by the deceased, do not constitute assets in their hands.⁵

7. It is now well settled, that the direction contained in most wills, that the executor shall pay all the testator's just debts and funeral charges, is to be regarded chiefly as mere form. Hence, where such direction contained the additional requirement, "and all interest thereon," it was regarded as only extending to such debts as were upon interest, or upon which the testator was liable to pay interest.⁶

8. In a recent case,⁷ Lord Chancellor *Campbell* said, when it was attempted to change the order of distribution of assets upon the ground that the will directed the executor to pay all the testator's just debts, — "I will not say that the words here relied upon are mere words of style, like the pious phrases with which wills usually began, but they do not seem to me to show that the testator had in his mind the option given him of making the debt fall upon the mortgaged land or on the personal estate."

9. The testator has most unquestionably the election to determine out of what particular fund or estate his debts shall be paid; but this direction is required to be explicit, or, at the least, clearly deducible from the will itself. The early cases required express words,⁸ but that strictness has been long since relaxed.⁹ And

⁴ *Plunket v. Penson*, 2 Atk. 290; *Aldrich v. Cooper*, 8 Vesey, 382.

⁵ *Trecothick v. Austin*, 4 Mason, 16; *Coverdale v. Aldrich*, 19 Pick. 391; *Johnson v. Ames*, 11 id. 173. But in this last case it was considered, as is the unquestionable law, that where the trust estate is mingled indiscriminately with the other estate of the deceased, there being no satisfactory mode of distinguishing it from the general mass of the estate, it will be regarded as assets in the hands of the personal representative, and the *cestuis que trustent* can only claim as general creditors.

⁶ *Tait v. Lord Northwick*, 4 Vesey, 816. Lord *Loughborough*, Chancellor, here said: "Charging the real estate ever so anxiously for payment of debts, will not of itself be sufficient to exempt the personal estate."

⁷ *Woolstencroft v. Woolstencroft*, 6 Jur. n. s. 1170.

⁸ *Fereyes v. Robertson*, Bunb. 301.

⁹ *Duke of Ancaster v. Mayer*, 1 Br. C. C. 454; 1 *White & Tudor's Lead. Cas. in Eq.* 505, where will be found a most exhaustive and satisfactory digest of all the very numerous cases upon this interesting and perplexing subject.

where the testator directs his charitable legacies paid out of his pure personalty, he in effect makes his other property applicable * for the payment of his funeral and testamentary * 354 expenses and other legacies.¹⁰

10. But many of the ablest and most experienced equity judges have regretted that any departure had been allowed from the ancient strictness upon this subject.

11. It must not be forgotten that this right of the debtor to direct out of what portion of his estate his debts shall be paid, after his decease, will not affect the rights of creditors, who will nevertheless be at liberty to pursue all the remedies in their power, unless restrained by the interposition of a court of equity, which will not be exercised to the detriment or even the embarrassment of such creditors.¹¹

12. And property in which the testator had no transmissible interest, except by means of a power of appointment, is only assets in the event of the appointment having been duly made.¹² But, by the late English statutes, wills are made to operate as a testamentary appointment, and creditors are entitled to a lien upon estate over which the debtor has a disposing power which he might have exercised for his own benefit without the concurrence of any other person.¹³

13. We may now consider the rule of law giving other claimants to an estate such rights as primarily belonged to creditors, by way of indemnity for what they had lost by reason of such creditors going against a fund in which they had an interest, such creditors having an election between such fund and others, and having

And the American edition contains an able analysis and thorough digest of the American cases by the learned editors.

¹⁰ *Beaumont v. Oliveira*, Law Rep. 6 Eq. 534 ; s. c. 17 W. R. 41 ; s. c. L. R. 4 Ch. App. 309 ; s. c. 17 W. R. 269.

¹¹ 2 Jarman, 587.

¹² 2 Jarman, 587 ; *Lassells v. Lord Cornwallis*, 2 Vern. 465 ; Prec. in Ch. 232 ; *Troughton v. Troughton*, 3 Atk. 656 ; *Lord Townshend v. Windham*, 2 Ves. Sen. 1, 8 ; *Jenney v. Andrews*, 6 Mad. 264 ; *Fleming v. Buchanan*, 3 DeG., M. & G. 976 ; *Williams v. Lomas*, 16 Beav. 1. But the rule is held not to apply to an appointment by a feme covert, so as to charge the property as her separate estate with her debts. *Vaughan v. Vanderstegen*, 2 Drew. 165. But otherwise, if she falsely represent herself as a feme sole. s. c. 2 Drew. 363, 408. See also *Davies' Trusts in re*, L. R. 13 Eq. 163.

¹³ 2 Jarman, 587, 588.

elected the former. This is always done where creditors have the election in regard to enforcing their debt against either one of two or more funds, and other claimants against the estate have a lien upon only one or more of such funds, but not upon all, and by means of such election are deprived of a portion or all * 355 means of * enforcing such lien. This is a familiar principle of equity law, and has been extensively applied in the administration of the estates of deceased persons.¹⁴ The case of *Aldrich v. Cooper* just cited is the leading case upon this point, and the discussion which the subject there underwent by the ablest counsel at the equity bar, Sir Samuel Romilly and Mr. Fonblanque, with the opinion of Lord *Eldon*, left little then known upon the subject which was not fully examined and deliberately weighed. The general rule of law is here thus stated: mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place against both the freehold and copyhold estates, so far as the personal estate has been taken away from them by such specialty creditor.

14. The subject of marshalling assets in the administration of estates, between different classes of creditors which for many years occupied so much space in the English equity books, is now of almost no importance there in consequence of recent statutes essentially qualifying most of the priorities formerly existing among different classes of creditors there and giving simple contract creditors a claim for payment against the real estate of the debtor. And in this country this portion of the subject was never of any great practical importance.¹⁵

¹⁴ 1 Story, Eq. Jur. §§ 633, 642, 643; *Aldrich v. Cooper*, 8 Vesey, 382; 2 Lead. Cas. Eq. 56, and notes, both English and American. These notes occupy more space than would be consistent with this work, but they will afford very important aid to all who desire to find a thorough analysis of all the decisions bearing upon the question.

¹⁵ 2 White & Tudor's Lead. Cas. in Equity, 70, in note to *Aldrich v. Cooper*, supra, and cases cited. It is scarcely needful to caution any one against adopting the view that this principle of marshalling assets, by which it has been said that a person having two funds to satisfy his demands, shall not, by his election, disappoint a party who has only one fund, has any application to the case of a creditor who holds a claim against two debtors and by collecting the whole of one will thereby disappoint other creditors of that debtor. He is still at liberty in ordinary cases, and where both debtors are joint principals

*15. But one question of importance, in regard to the * 356 rights of mortgagees to prove their whole debt against an insolvent estate of the deceased mortgagor, seems not fully settled in the English courts of equity, and in consequence will be liable to invite discussion in this country. The rule in bankruptcy seems to be that the mortgagee can only prove for the balance of his debt, first applying the amount of his security.¹⁶ In the case of *Greenwood v. Taylor*,¹⁶ the same rule was applied to the case of a mortgagee, who petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor. Sir *John Leach*, M. R., said, "This rule is not founded, as has been argued,

in the debt, to enforce its payment against either, or both, and in any proportions suiting his convenience. *Kendall, Ex parte*, 17 Vesey, 514, 520. But it may possibly form an exception to this rule, as suggested by Lord *Eldon*, in the case last cited, where the claim is founded on some equity, by which one creditor has a right, for his own sake, to compel the other to go against one creditor in preference to the other. His lordship here evidently refers to the case of sureties, where there would be a kind of remote and indefinite equity, in decreeing the creditor to go first against the principal debtor, if he would otherwise expose the creditors of the sureties to unjust peril. But we apprehend that it was never maintained in any case, that while the surety was living, either he, or his creditors, could compel the common creditor to go first against the principal debtor, until he had exhausted all his available remedies against him, before he resorted to the sureties. That is not the fair import of the ordinary undertaking of a surety. He is bound equally with the principal debtor. And even where the creditor has other collateral securities for the debt, by way of mortgage or otherwise, it is not competent for a court of equity to compel him first to exhaust these, before resorting to the surety. The position of the surety is one voluntarily assumed, and is that of an absolute debtor, and he must be content to stand by it, until the debt is paid, and not claim to throw any embarrassments in the way of the creditor not fairly coming within the terms of the contract, or induced by the happening of events not anticipated at the inception of the undertaking, such as death or insolvency. The surety may unquestionably, upon the payment of the debt, claim to be subrogated to the rights of the creditor, as to all securities against the principal. This is clearly the extent of his claim to equitable interference, during his life and for his own sake; and we see no reason to question, either upon principle or authority, that the same rule will apply after his decease. *McCollum v. Hinckley*, 9 Vt. 143; 1 Story, Eq. Jur. § 640. The rule of the civil law was more favorable to the surety. 1 Story, Eq. Jur. § 641.

¹⁶ *Ex parte Smith*, 2 Rose, 63, and cases cited; *Greenwood v. Taylor*, 1 Russ. & My. 185, per Sir *John Leach*, M. R.

upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets. The mortgagee who has two funds, as against the other specialty creditors, who have but one fund, must resort first to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay.”¹⁷ But this

* 357 decision * was questioned in a later case¹⁸ by Lord *Cottenham*, Chancellor. His lordship said, “I cannot distinguish this case from *Greenwood v. Taylor*, but with respect to the principle of that case, it is to be observed, that a mortgagee has a double security: he has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see. The question can only arise when there is a deficient security, and an insolvent estate. So that the worse the creditor’s case, the harder the course of the court against him. What you contend is, that the creditor shall not proceed to enforce his legal rights unless he gives up his security.”¹⁸ With all deference and respect for the learning and ability of Lord *Langdale*, who was one of the ablest of the many distinguished English equity judges, it seems to us very obvious, that Lord *Cottenham’s* criticism is altogether well founded, and that the misapprehension resulted chiefly from regarding the remedy in equity and at law, as being for the same cause of action. The truth undoubtedly is, that they seek to enforce the collection of the same debt, but the remedies are no more identical, than any other collateral remedies for the same debt, which may always all be prosecuted at the same time, both at law and in equity, until the debt is collected, and the costs in each suit.

¹⁷ It seems to be well settled, that if the mortgagee foreclose his mortgage, he can only sue for the balance of the debt above what the mortgaged estate brings, and that this even will have the effect to open the decree of foreclosure, and let in the mortgagor to redeem the whole estate, if he so elect. *Tooke v. Hartley*, 2 Br. C. C. 125; s. c. 2 Dick. 785, which latter is said to be much the best report of the case. See also *Perry v. Barker*, 8 Vesey, 527; 2 Story, Eq. Jur. § 1025; 4 Kent, Comm. 181–184; *Perry v. Barker*, 13 Vesey, 198; *Lovell v. Leland*, 3 Vt. 581, and cases cited.

¹⁸ *Mason v. Bogg*, 2 My. & Cr. 443, 448. In *Barker v. Smark*, 3 Beav. 64, Lord *Langdale*, M. R., said, “Although a mortgagee was entitled to pursue all his remedies concurrently, yet in this case, where the vendor had taken a bond to secure the purchase-money, he could not be permitted to sue at law and in equity, at the same time. . . . If he failed in one remedy he might resort to the other.”

It was never claimed that because different sureties were bound by different instruments for the same debt, that separate actions might not be concurrently maintained against each. And we see no more reason why the mortgagee may not pursue his mortgage in equity, and his security at law, at the same time. It is certain that is every day's practice, during the life of the mortgagor, and * we can conceive no good reason why the remedies * 358 of the mortgagee should be abridged by the decease of the mortgagor. And some of the American cases have certainly taken this view.¹⁹ But others seem to consider, that by the decease of the mortgagor the mortgagee is put to his election between different remedies, all of which were valid, both at law and in equity, during the life of the mortgagor, and might have been contemporaneously prosecuted, until the entire debt was recovered. In one case²⁰ the rule in bankruptcy was adopted, as affording a satisfactory analogy. And in another case²¹ it seems to have been decided, upon

¹⁹ *Duncan v. Fish*, Admr., 1 Aikens, Vt. 231; *Walker v. Barker*, 26 Vt. 710; *Putnam v. Russell*, 17 Vt. 54.

²⁰ *Amory v. Francis*, 16 Mass. 308.

²¹ *Johnson v. Corbett*, 11 Paige, 265. We have examined the American cases with some care, and have been surprised to find no more upon the subject, and quite as much surprised to find so much leaning in favor of the application of the rule in bankruptcy to insolvent estates of deceased debtors. There seems to be a manifest injustice, as suggested by Lord *Cottenham*, *supra*, in depriving the mortgagee of all advantage of his security, in just that class of cases where he most desires to rely upon it. We cannot question that the very just and sensible views of his lordship must ultimately prevail where the matter is not regulated by statute. And we should hope, for the credit of humanity, and the success of good faith and honesty, that even statutory enactments would not attempt to deprive parties of the just and equitable benefits of such securities as have been fairly obtained. But it must be admitted that the later English equity decisions rather favor the view taken of this question by Lord *Langdale*. *King v. Smith*, 2 Hare, 239; *Tipping v. Power*, 1 Hare, 405. See also *Rome v. Young*, 3 Y. & C. Exch. Ca. 199; 4 Y. & C. Exch. Ca. 204; *Wickenden v. Rayson*, 6 DeG., M. & G. 210. And the objections which we certainly feel, with great clearness and sincerity, against the rule in bankruptcy being applied to this class of cases, may possibly result, in part, from long settled convictions rather than from the obvious equity and justice upon which they rest. And we feel compelled to admit that the weight of authority is, at present, rather against the ultimate prevalence of that view, which seems to us so manifestly just and equitable. In *Brocklehurst v. Jessop*, 7 Sim. 438, it was decided that an equitable mortgagee, after the death of the mortgagor, is entitled to have the estate sold, and the proceeds applied in payment of his debt, and to stand as a creditor against

* 359 general * principles, that where the decedent, at the time of his death, was seised of a large real estate, and had

the general assets of the mortgagor for any balance which may remain unpaid. And in *Tipping v. Power*, 1 Hare, 405, 409, Vice-Chancellor *Wigram* said, “ *White v. Bishop of Peterborough*, 3 Swanst. 109 ; s. c. Jac. 402 ; *Wontner v. Wright*, 2 Sim. 543, were also similar cases, and in all of them [including *Kenebel v. Scaffton*, 13 Vesey, 370] the court expressly says, that the first mortgagee is entitled to have the whole of the proceeds applied in paying his debt, if he insist upon his right to foreclose ; but that if he chooses a sale, he then introduces a new mode of winding up the estate not within his contract, and that the costs of the suit are in such a case to be considered as the costs of administering the fund, and ought therefore to be paid in the first instance. The mortgagee is supposed to have a benefit which a foreclosure would not give him, — that of obtaining the proceeds of the sale and recovering the rest from the estate, — this he would not otherwise do without incurring the risk of opening the foreclosure. . . . It is laid down in *Cruise’s Digest*, and other text-books, that where a legal mortgagee has a bond, or a covenant, the court will sell the mortgage and allow the party to prove for the difference.” After quoting other cases bearing upon the point, the learned judge concludes : “ In the case of a legal mortgage the argument is this, that the strict right of the mortgagee is foreclosure, but if he chooses to consent to a sale, and takes the benefit of that course of proceeding, he acquires a new right.” This seems to explain the apparent conflict in the English cases upon the point. If the mortgagee insist upon enforcing his debt against the estate, he cannot be compelled to consent to a sale, and he may delay his foreclosure until the personal estate is distributed among creditors and come in for his share, as a general creditor, or he may foreclose upon the estate, in which event he cannot pursue his debt without opening the foreclosure. But if his mortgage contain a power of sale, he may then elect between a sale and foreclosure, probably, and will not be compelled to resort to either, so long as he prefers to come in as a general creditor. This is certainly the reason and justice of this class of cases, and so far as any rule of law has yet been established seems entirely consistent with the decisions upon the point.

In the case of *Wickenden v. Rayson*, 6 DeG., M. & G. 210, it is laid down by the Chancellor, as the settled rule of the courts of equity, that in a creditor’s suit for the administration of the real and personal assets of a deceased person, mortgaged real estate cannot be sold without the consent of the mortgagee, except subject to his mortgage. The standing rule of the courts of equity therefore is, that if the mortgagee is a party to the proceedings, he must elect at once whether he will concur in the sale ; and if he is not a party, the order will be made in the alternative, that the estate be sold entire, if the mortgagee concurs in the sale, and otherwise, that it be sold subject to his mortgage. In *King v. Smith*, 2 Hare, 239, it is intimated that the mortgagee may sustain a suit against the executor for the sale of the mortgaged premises, and the application of the avails to the payment of the sum due upon the mortgaged debt and for payment of any balance remaining due,

personal estate sufficient to pay his debts, exclusive of debts which were then fully secured by mortgages upon his real estate, in the settlement of the administration account, that the debts thus secured by real estate could not be allowed, as against the personal estate, but that the value of the security must first be applied, and only a pro ratâ * payment, with other creditors * 360 not thus secured, be made upon the unsecured balance.

And it was here also decided, that where a mortgage debt is primarily chargeable upon mortgaged premises, as by the revised statutes of New York all mortgages upon descended or devised estates are, and where the security was sufficient to pay the debt in the hands of the heirs or devisees, if the mortgagee, to accommodate such heirs or devisees, delays the foreclosure of his mortgage until the lands fall in value and become insufficient security; and in the mean time the personal representatives of the decedent pay out the whole personal property, the mortgagee has no claim against them to make good any deficiency which may ultimately arise in regard to the mortgage security. This seems to be requiring the mortgagee to administer upon the real estate upon which he holds a lien for the security of a personal debt of the deceased. Such a rule, it seems to us, would be likely to result in many embarrassing and perplexing questions. The rule laid down in *Duncan v. Fish*,¹⁹ seems more just and reasonable, because more in analogy to the creditor's rights during the lifetime of the debtor. It is there said by *Hutchinson*, Ch. J., "The creditor, without foreclosing his mortgage, can claim a dividend with other creditors." "If this reduce the mortgage so that the estate will sell for more than the balance due upon the mortgage, it is the duty of the administrator to dispose of it; and, after paying the amount remaining due upon the mortgage, place the balance to the credit of the general fund." We think this the only just mode of disposing of the questions involved.

16. But the chief importance of this question arises between different legatees and devisees, or between them and creditors, as to what classes of legatees or devisees shall first contribute to make up any deficiency in regard to the payment of debts.

17. It was for a long time controverted whether the heir or out of the general assets of the estate. But in *Nat. Bank v. State Bank*, 14 Am. Law Reg. N. S. 281, note, 289, it seems to be conceded that the rule in bankruptcy has finally prevailed in the courts of equity, despite its injustice.

devisee of estates devised should first contribute to the payment of debts, i.e., whether descended or devised estates were first liable to contribute to supply any deficiency in the fund provided for the payment of debts. It was finally settled in favor of the latter being last liable.²² But this result received the disapprobation of * Lord *Thurlow*, in *Donne v. Lewis*,²³ and of Lord *Eldon*, in *Milnes v. Slater*,²⁴ as being a rule not meeting the probable purpose of the testator.

18. We shall be able to make this subject somewhat more intelligible by stating the rules of law more in detail, in regard to different estates compelled to contribute to the payment of debts where a deficiency of assets occurs.

(1.) The personal estate is the natural and the primary fund for the payment of debts, and this will be first applied until exhausted, unless there is an express provision in the will that the debts shall be paid in whole or in part, out of some particular fund specially provided and set apart for that purpose.²⁵

²² 2 Jarman, 548; *Galton v. Hancock*, 2 Atk. 430, where Lord *Hardwicke* examines the subject with great thoroughness, and first came to the conclusion that the devisee could not claim to have the incumbrance upon his estate paid out of real estate descended to the heir; but on further review of the authorities he was clear that the law was settled otherwise in the time of Lord *Nottingham*. *Popley v. Popley*, 2 Ch. Ca. 84; s. c. nom. *Pockley v. Pockley*, 1 Vern. 36. In this case the testator gave express direction that the mortgage upon his estate, which was not his own proper debt, should be paid out of his personal estate, and the court held that entitled the devisee to exoneration, but that without that no such claim could be maintained. It is here said, that the purchase of an equity of redemption entitles the party to hold the land subject to the debt, and is equivalent to "the purchase of the land subject to the debt due upon the mortgage," and that such debt can never charge the person of the purchaser or become his own proper debt. But his having given express direction in his will, and got the "mortgage so transferred as to protect his purchase," it was considered the devisee was entitled to exoneration.

²³ 2 Br. C. C. 257.

²⁴ 8 Vesey, 295.

²⁵ *Gore v. Brazier*, 3 Mass. 523, 536; *Dean v. Dean*, id. 258; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Hawley v. James*, 5 Paige, 318; *M'Kay v. Green*, 3 Johns. Ch. 56; *Livingston v. Newkirk*, id. 312; *Livingston v. Livingston*, id. 148; 1 Story, Eq. Jur. § 573; 4 Kent, Comm. 420; *Stevens v. Gregg*, 10 Gill & J. 143. And doubtful words in a will are not sufficient to exempt the testator's personalty from the payment of debts and charge them upon the realty. *Seaver v. Lewis*, 14 Mass. 83; *Brydges v. Phillips*, 6 Vesey, 570. But where the testator had mortgaged part of his estates to secure a marriage portion for his daughter, and covenanted to pay the money; and in his will directed

*(2.) The fund liable to the payment of debts next in order is that portion of the real estate specially set apart by the will for the payment of debts.²⁶ But to produce this effect the will must go beyond a mere charge for the payment of debts, as where lands are devised "subject to the payment of all the testator's just debts." The will must create a particular fund for the payment of debts. As expressed by Lord *Alvanley*:²⁷ "The question whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift of any part of the estate for the purpose of paying the debts; or whether it is only a general charge for that purpose. For upon the doctrine that is very fully laid down by Lord *Thurlow*, in *Donne v. Lewis*,²⁸ there is no doubt of the manner in which the estate of the testator is to be applied in discharging his debts."

his debts to be paid, first out of the residue of his personalty; next out of his money in the funds, and lastly out of his residuary real estate, it was held the mortgaged estate was not to be exonerated from the burden out of the personal estate. *Graves v. Hicks*, 6 Sim. 391. But this case was decided upon the ground, that the marriage portion was intended to be made a special charge upon the estate, and that the covenant of the testator for the payment of the money was merely in aid thereof, otherwise it must have been paid out of the personalty in the first instance. *Yonge v. Furze*, 20 Beav. 380. See also *Fream v. Dowling*, 20 Beav. 624; *Bruce v. Morice*, 2 DeG. & Sm. 389; *Finch v. Shaw*, 19 Beav. 500.

²⁶ 4 Kent, Comm. 421; 2 Jarman, 392. Chancellor *Walworth*, in *Rogers v. Rogers*, 1 Paige, 188, lays down the rule rather loosely, and without much examination, that where land is devised on condition of the payment of the debts, or where the debts are directed to be paid out of the land devised, the real estate will be first resorted to for the payment of the debts, recognizing the general rule, that the personal estate is the primary fund for that purpose.

²⁷ *Manning v. Spooner*, 3 Vesey, 114.

²⁸ 2 Brown's C. C. 257. Lord *Thurlow*, with his characteristic point, here defines the rule thus: "The question then will always be this, and the only one that can reconcile all the cases, — Are the terms of the will only a general indication that the testator means to subject his property to his debts, and not to be a knave, as many of the cases treat the man who does not; or does he mean more, and to make a particular provision for the purpose?" The earlier cases are here reviewed with great thoroughness by his lordship, and it is very clearly shown that the rule is not based upon the proper principle of the intention of the testator, but upon a merely arbitrary and artificial distinction; but that it is too clearly settled to be questioned. *Davies v. Topp*, 1 Br. C. C. 524; *Powis v. Corbet*, 3 Atk. 556; *Wride v. Clark*, in note to *Donne v. Lewis*, *supra*.

His lordship further adds, in his classification of assets, that to this effect the estate must be particularly devised, for the purpose of the payment of debts, and for that purpose only. Lord *Eldon*, in *Milnes v. Slater*,²⁴ thus defines the rule: "Where a will, going beyond a mere charge, creates a particular fund for the payment of debts, that fund shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not; but a mere charge upon a devised estate will not protect an estate descended from being first applied." And he subsequently adds:

"The rule must be considered as settled that, if there be a
* 363 real fund created for the discharge of debts, * that will be to be applied first, when the question arises between the heir and devisee, either as to estates which the deviser had at the time, or which were acquired afterwards." And it has been decided that it will make no difference that the estate devised is equitable assets, and that the descended estate is legal assets.²⁹ The rule is thus laid down in *Davies v. Topp*:³⁰ "The testator devised certain estates, subject to a general charge for payment of debts; he afterwards purchased another estate which descended; this shall exonerate the devised estate, if the personal estate be insufficient to pay the debts." "It seems singular," as said by Lord *Eldon*,³¹ "that a will creating a rule of distribution with reference to the present circumstances of the deviser, shall be taken to create a rule of distribution which commences afterwards, and which nine times in ten he does not contemplate." But it is to be remembered, in extenuation of this apparent inconsistency, that the language of the will is continued as ambulatory during the whole future life of the testator, and as speaking his purpose and direction, in regard to the final disposition of his worldly effects, at the last moment of his conscious existence. So that, although if the subject were new, we might agree with those who think that the mere charge of the devised estate, with the payment of debts, ought ordinarily to be regarded as sufficient to create the basis of holding such estate liable, before an estate in regard to which no such intention had been expressed by the testator; it is not very apparent why the circumstance of the descended estate being subsequently acquired, should make the case stronger in favor of the heir, or why the con-

²⁹ Lord *Eldon*, in *Milnes v. Slater*, ante, n. 24.

³⁰ 1 Br. C. C. 524.

³¹ *Milnes v. Slater*, 8 Vesey, 295, 303, 304.

verse of making a special appropriation of an estate to the payment of debts should be weakened by the fact that the descended estates, which are to be exonerated by the estate specially appropriated to the purpose of paying debts, were acquired subsequent to the execution of the will. All arguments, as to the intention of the testator, derivable from the state of his property at the date of the will, seem to be fully answered by the fact that the testator, by suffering his will to remain unaltered, is, in contemplation of law, supposed to repeat its language, as his continued direction, in regard to the final disposition of his worldly estate, until the very moment of his departure out of this life. The rule is thus laid *down by Lord *Eldon* in another case:³² “The first * 364 fund applicable (to the payment of debts) is the personal estate, not specifically bequeathed; then land devised for the payment of debts; not merely charged, but devised or ordered to be sold.” And in discussing the distinction adverted to, between a mere charge of debts upon real estate, and the setting apart a specific fund for that purpose, his lordship places stress upon the fact that the testator goes so far as to “propose the mode in which the debts are to be paid,” and adds, “it is difficult to deny that distinction upon examining all the cases.”

(3.) Without further discussion of the cases, we may safely affirm, as the settled rule at the present time, that estates devised, in general terms, or with the mere general expression of a charge for the payment of debts, as subject to the payment of all my just debts, or other equivalent expressions, are not liable to the payment of debts, until after the personal estate, and the real estate descended to the heir, are first exhausted. Thus the following classification, which is found in most of the American books upon the subject, will be sufficient for the solution of most questions arising in the distribution of estates. 1. Personal estate not exempted expressly or by implication.³³ 2. Lands specially devised

³² *Harmood v. Oglander*, 8 Vesey, 106.

³³ *Oneal v. Mead*, 1 P. Wms. 693. In this case it was held, that where the testator left his real estate to descend to his heirs, incumbered by a mortgage created by himself, and devised his leasehold to his wife, having no other personal estate, that the mortgage, although the proper debt of the testator, should not be paid by the personal estate specifically devised. But in *Sir Peter Soame's case*, cited in argument here, it was held that the general personal estate shall exonerate the real estate descended, as to a mortgage created or adopted by the testator. The same rule is declared in *Cope v. Cope*, 2 Salk.

* 365 *and set apart for the payment of debts. 3. Lands descended. 4. Lands specifically devised.⁸⁴

(4.) The subject of marshalling assets in the administration of

449, where the personal assets are sufficient to pay all debts and legacies, otherwise it is here held the general legatees must be paid before the mortgage. See Mr. Cox's note to the case. *Howel v. Price*, 1 P. Wms. 291. In this last case the Chancellor adopts the rule that the personal estate devised, subject to debts, shall exonerate real estate descended. But this may be regarded, perhaps, as the case of a residuary bequest which does not stand in as favorable light as that of a general legatee. *White v. White*, 2 Vern. 43. But in *Howell v. Price*, 2 Vern. 701, it is reported to have been held that the personal estate could not be applied to exonerate real estate subject to a Welsh mortgage, there being no covenant to pay. This seems more consistent with the facts in the case than the report in P. Wms., ante. But the two reports may be reconciled by regarding the case as not finally disposed of in Vernon, and that the final decree was, as stated in P. Wms., and if so it was not in conformity with later cases. *Johnson v. Milksopp*, 2 Vern. 112; *Evelyn v. Evelyn*, 2 P. Wms. 659; *Lord Gray v. Lady Gray*, 1 Ch. Cas. 296; *Gower v. Mead*, Prec. in Ch. 2; 1 Story, Eq. Jur. § 573; *Hawley v. James*, 5 Paige, 318.

⁸⁴ *Adams v. Brackett*, 5 Met. 280; *Bateman v. Bateman*, 1 Atk. 421; *Lanoy v. Duke of Athol*, 2 id. 444; *Powis v. Corbet*, 3 Atk. 556; *Ellison v. Airey*, 2 Ves. Sen. 568; *Livingston v. Newkirk*, 3 Johns. Ch. 312. In this last case the order of marshalling assets is thus declared by the Chancellor, *Kent*. 1. The general personal estate. 2. Estates *specifically and expressly* devised for the payment of debts, and for that purpose only. 3. Estates descended. 4. Estates specifically devised, though charged generally with the payment of debts. Real estate is not liable to contribute to make up any deficiency in the personalty for the payment of legacies. *Hayes v. Seaver*, 7 Greenl. 237; *Humes v. Wood*, 8 Pick. 478. The order of marshalling assets is extensively discussed in *Hays, Executor, v. Jackson*, 6 Mass. 149, 151, where the order is given much as hereinbefore stated. In *Hubbell v. Hubbell*, 9 Pick. 561, the court say lands specifically devised are not liable to be sold for the payment of specific legacies, or for the payment of debts, in order to enable the executor to deliver chattels specifically bequeathed. But where a legacy is made a charge upon the land devised, the land is the fund for the payment of the legacy, and the personalty is thereby exempt. *Holliday v. Summerville*, 3 Penn. 533; *Ward v. Ward*, 15 Pick. 511. No particular form of disclaimer of a devise, with charge, is requisite in order to prevent any personal obligation attaching to the devisee. It is sufficient that he do not accept the devise. *Ib.* Devise of half the testator's estate to one of his children, and the rest to his other children: Held, the first half not chargeable with debts. *Shorr v. M'Cameron*, 11 S. & R. 252. A mere charge or direction to the devisee to pay money to another, does not create a charge upon the estate, but only a personal duty upon the devisee. *Fox v. Phelps*, 17 Wend. 393; s. c. 20 id. 437. See *Stead v. Hardaker*, L. R. 15 Eq. 175, as to what amounts to making real estate chargeable with debts.

the estates of deceased persons, is very extensively discussed by the most thorough master of equity law which America has produced, in an important case decided many years since, and which has been ever since regarded as of binding authority upon that subject in all the courts of the country where similar questions have arisen.³⁵ The following points were here expressly decided :

³⁵ *Livingston v. Newkirk*, 3 Johns. Ch. 312. The learned Chancellor here says, that the general and natural order of marshalling assets for the payment of debts is : 1. The personal estate ; 2. Lands descended ; 3. Lands devised. Lord *Thurlow*, in the discussion of *Donne v. Lewis*, 2 Br. C. C. 257, thus classifies the order : 1. The general personal estate ; 2. Ordinarily speaking, estates devised *for the payment of debts* ; 3. Estates descended ; 4. Estates specifically devised, even though they are generally charged with the payment of debts. This subject is next brought before Lord *Alvanley*, in *Manning v. Spooner*, 3 Vesey, 114, where the authorities are again very extensively reviewed. The conclusion to which this able and learned equity judge came was, that the priority of the liability of devised estates to descended estates depended upon there being a specific gift of any part of the estate for the purpose of paying debts, and not a mere *general charge*. In a recent case, *Harvey v. Steptoe*, 17 Gratt. 289, where one conveyed real and personal property, in trust, for the payment of his debts, and died intestate before the sale of the same, it was held the reversion of the trust property descended to the heirs and next of kin, but that the reversion or quasi equity of redemption was to be regarded as legal assets, and any funds in the hands of the trustee as equitable funds, and must be applied ratably to legal and equitable claims. A nice question often arises in administration suits in equity, in regard to the right of a pecuniary legatee to marshal the assets in such a manner as to compel the residuary devisee of lands to contribute to the payment of debts which the general personalty was inadequate to meet. There is a recent case in the Court of Chancery Appeal, *Hensman v. Fryer*, Law Rep. 3 Ch. App. 420 ; s. c. Law Rep. 2 Eq. 627, where the Lord Chancellor *Chelmsford* examined the question and the cases with care. The impression of some of the English equity judges seems to have been since the wills act, making wills embrace all the testator's lands at the time of his decease, whether acquired before or after the date of the will, that a residuary clause embracing lands was no more to be regarded as a specific devise of real estate embraced in it, than such a bequest of personalty was. But the argument of the Lord Chancellor in this case shows, very conclusively, that, as to all lands owned by the testator at the date of the will, its operation upon them by means of the residuary clause was just as specific as under the former law, where no subsequently acquired lands could pass by the will. His lordship after discussing the views expressed by Lord *Cottenham*, *Mirehouse v. Scaife*, 2 My. & Cr. 706, and quoting with approbation those of Vice-Chancellor *Knight Bruce*, *Tombs v. Roch*, 2 Coll. C. C. 502, declared that the pecuniary legatee and the residuary devisee of land must contribute ratably to the payment of debts which

* 366 * After-acquired lands do not pass by the will, unless there is some statutory provision to control the matter, as there is at present in England and in most of the American states. An equitable interest in land, founded on a contract of purchase, will pass by a subsequent devise, and if there be no devise, it will descend to the heir, and the executor must pay the purchase-money for the benefit of the heir.

19. If the executor or administrator pay debts out of his own estate to the value of the assets in his hands, he may apply these assets to reimburse himself, and by an election to do so the assets become his own property. If an executor be directed to

* 367 sell land, * it seems that he cannot retain it as he may personal assets. But if he have paid debts to the value of such land, he may sell the land and retain the proceeds for his indemnity. Lord *Alvanley* here adopts the same classification in regard to the order of marshalling assets in the payment of debts as that already stated in the case of *Livingston v. Newkirk*, ante, note 34. Lord *Eldon*, although often expressing doubts and difficulties with the earlier cases, did not dissent from or qualify them, as we have already seen; and such is the result to which the learned Chancellor comes in the case last named. Hence we may now safely conclude that is the settled law upon the subject of marshalling assets for the payment of debts.

20. The most obvious, and the chief reason, why descended estates have been held liable before devised estates, is, that every devise of real estate is regarded as specific, and this will be so regarded, as we have seen, although the devise be contained in a general clause in the will, or even where it comes under the general words, "all the residue of my estate, real and personal." ³⁶ The

the general personalty proved inadequate to meet. See *Lancefield v. Iggulden*, 22 W. R. 726; L. R. 17 Eq. 556; s. c. reversed, L. R. 10 Ch. App. 136, and *Hensman v. Fryer*, supra, reaffirmed, as of binding force and authority. See also *Tomkins v. Colthurst*, 24 W. R. 267.

³⁶ *Forrester v. Lord Leigh*, Amb. 171; *Keeling v. Brown*, 5 Vesey, 359; *Milnes v. Slater*, 8 Vesey, 295, 303; *Mirehouse v. Scaife*, 2 My. & Cr. 695. But this only extends to the case of states where the testator can only dispose by will of such real estate as he is seised of at the date of his will, and not, it has been said, where, as by the recent English statute, and those of most of the American states, one may dispose of all his real estate at the time of his decease, although acquired subsequent to the date of the will. In such cases, the residuary clause in the will operating upon subsequently acquired lands,

authorities are here so elaborately discussed, that a brief outline of the results will be valuable to be here presented.

21. The question arose between general pecuniary legatees and the residuary legatee of the real estate, under the law as it stood before the late English statute. In examining the authorities, the Lord Chancellor considered that *Hanby v. Roberts*³⁷ turned on the rule established in the earlier cases.³⁸ This rule is thus very distinctly stated in *Bligh v. The Earl of Darnley*: one * by will gives several legacies, some charged on real estate * 368 and others not; if the personal estate proves not sufficient to pay all the legacies charged on the real estate, they shall be paid thereout; and if they have been paid out of the personal estate, the other legacies as to so much shall stand in their place upon the land.

22. We see no reason to doubt this as the existing rule of law upon that point. And the question in regard to what language shall be sufficient to charge pecuniary legacies upon real estate must depend upon intent. It is held that where the will charges legacies generally upon land, as by devising the land to one, after payment of debts and legacies, this will extend not only to legacies given by the will, but to those given by any after codicil.³⁹ But where the charge is only to pay the legacies "hereby given," it will not extend to legacies given in a codicil not executed so as to charge lands.⁴⁰ And the early case⁴¹ where it is held, that upon a general devise of land upon condition that the devisee, within two months after the death of the testator, pay the debts, and the legacies within three months, there being no disposition of the personal estate, that shall be first applied in ease of the real estate devised, so far as it will go, seems to rest upon sound principle, although sometimes questioned.

no devise of real estate will be regarded as specific, unless it contain a description of the estate sufficient to enable the devisee to identify the same, or be applied only to lands owned by the testator at the date of the will. But see *Gibbins v. Eyden*, Law Rep. 7 Eq. 371; s. c. 17 W. R. 481; ante, Vol. II. 144, n. 42. And see post, n. 47.

³⁷ Amb. 127.

³⁸ *Bligh v. Earl of Darnley*, 2 P. Wms. 619; *Masters v. Masters*, 1 P. Wms. 421, which is recognized in *Bonner v. Bonner*, 13 Vesey, 379.

³⁹ *Hannis v. Packer*, Amb. 556.

⁴⁰ *Bonner v. Bonner*, 13 Vesey, 379; ante, Vol. I. § 22.

⁴¹ *Gower v. Mead*, Prec. in Ch. 2.

23. Where the devise of the personal estate, and also of the real, is specific, both must contribute to the payment of debts *pro ratâ*.⁴² And it seems that where the legacy is general, and the payment out of personalty is disappointed by the devise of real estate subject to a mortgage by a former owner and the mortgagee going against the personal estate for the payment, that the legatee
 * 369 may * stand in the place of the mortgagee, but not where the personalty is absorbed by the payment of specialty debts.⁴³ Lord *Hardwicke* here refused to marshal the assets in favor of pecuniary legatees, so as to throw the debts upon the real estate devised in the residuary clause of the will, saying that every devise of land is specific, as no more passes by the will than the testator has at the time. The same rule is maintained in *Scott v. Scott*,⁴⁴ and seems to be favored in *Herne v. Meyrick*.⁴⁵ And the same point is decided in a later case,⁴⁶ where Lord *Macclesfield*

⁴² *Long v. Short*, 1 P. Wms. 403. But it is said here by way of supposition, "if the devise to A." [of the estate in fee] "had been of all the rest of his estate, then A. should have paid the debts." And this is argued by Lord *Cottenham*, in *Mirehouse v. Scaife*,⁸⁶ as the established rule of law at the present day. But it is laid down in *Rogers v. Rogers*, 1 Paige, 188, that where the will contains no direction as to the payment of debts, chattels specifically devised must be applied to the payment of a judgment against the testator before resort is had to the real estate devised. But the rule laid down in the text seems more just and more in accordance with the probable intent of the testator, and is sustained by *Gervis v. Gervis*, 14 Sim. 654, overruling *Cornwall v. Cornwall*, 12 id. 298. And in *Jackson v. Pease*, L. R. 19 Eq. 96, it was held that personalty and realty, specifically bequeathed, and the residuary realty, are chargeable concurrently.

⁴³ *Forrester v. Lord Leigh*, Amb. 171. The general doctrine is here fully recognized, that a mortgage upon land devised, created by a former owner, is not entitled to be exonerated out of the personal estate. The Lord Chancellor, *Hardwicke*, says here, "A mortgage is a lien and an estate in the land. By devise of land mortgaged nothing passes in point of law *but the equity of redemption*, if it is a mortgage in fee." See also *Powell v. Robins*, 7 Vesey, 209.

⁴⁴ Amb. 383.

⁴⁵ 1 P. Wms. 201. But it is here said it would be otherwise if the land had descended to the heir, instead of being specifically devised in tail. It seems to be a fair presumption in regard to the intention of the testator, that, where he gives legacies greatly exceeding the value of his personalty, he must intend to charge his real estate with the payment of them. *Estate of Monro*, 39 Leg. Int. 332.

⁴⁶ *Clifton v. Burt*, 1 P. Wms. 678.

said: "Every devise of land is a specific legacy, and shall not be broken in upon, or made to contribute towards a pecuniary legacy."

24. But it was finally determined in the House of Lords,⁴⁷ that, as between a residuary devisee and a specific devisee, the former should first be made to contribute to the payment of general pecuniary legacies charged upon all the estate generally. The case came up from the decision of the Court of Exchequer, where it had been decided that there was no difference between the two, inasmuch as both were equally specific. But the House of Lords, upon the concurrence of opinion between Lords *Eldon* and *Redesdale*, who appear to have been consulted, came to a different conclusion, upon the ground obviously of an apparent difference in the expressed purpose of the testator. Lord *Manners* is reported to have said on this occasion: "By the general rule, a specific devisee * or specific legatee shall not contribute to make * 370 good a pecuniary legacy; but there can be no such rule applicable to a residue." Lord *Cottenham* here insists that this rule must be received with some qualification. For where the will enumerates all the testator's property, and then gives certain specified articles or estates to one or more legatees or devisees, and the remainder to another, the latter bequest is as specific as the former. And he further argues, very justly, that there can be no difference between giving real estate by such general terms as "all my land" in such a town or county, and the residue of my real estate, embracing precisely the same thing.

25. In a decision by Sir *John Romilly*, M. R., in a late case,⁴⁸ that experienced and learned judge thus sums up the law:—

"The general principle to be deduced from the cases was, that a testator, knowing that his personal estate was the primary fund for the payment of legacies, must use clear and distinct words to

⁴⁷ *Spong v. Spong*, 3 Bligh, N. S. 84. And in *Hensman v. Fryer*, Law Rep. 2 Eq. 627, S. C. 12 Jur. N. S. 681, it was declared that since the wills act, a general pecuniary legatee has the right of marshalling as against the residuary devisee of real estate. But on appeal, S. C. Law Rep. 3 Ch. App. 420, the Lord Chancellor reversed the decree of the Vice-Chancellor, and held that pecuniary legatees, and the residuary devisee of land must contribute ratably, according to the values of the several bequests towards the payment of debts, which the general personalty was not adequate to meet. See Story, Eq. Jur. 10th ed. § 645 b; *Collins v. Lewis*, L. R. 8 Eq. 708.

⁴⁸ *Ion v. Ashton*, 6 Jur. N. S. 879.

exonerate it. There was no general rule, that in no case should personal estate be exonerated in the absence of express directions. What the court had to do was to gather from the will the intention of the testator. There were several modes by which the court endeavored to gather this intention. “(1.) It was presumed that the personal estate was primarily liable, where the real and personal estate were given to the same person. (2.) It was a strong presumption in favor of the exoneration of the personal estate, where the whole personal estate was directed to be charged with some particular charges, omitting those which would otherwise have fallen on it, if no mention had been made of any particular charges.”

In the case before the court, the testator gave an annuity on rent charge, and charged it on real estate. Then he gave certain legacies and charged them on real estate, and devised the estate subject to the charge. He charged other legacies in the same way, and then made a residuary devise in favor of the plaintiff in fee. His honor considered that as the testator had charged certain legacies on the real estate, and devised them subject thereto, and

made a similar disposition of the personal estate, it was fair * 371 to infer * that he did not intend the personal estate to be charged with the payment of the charge placed upon the real estate.

26. There is one class of burdens which rest primarily upon specific real estate, although embraced within the general mass of the indebtedness of the testator. This will embrace all estates which the testator had acquired, subject to incumbrances created by others.⁴⁹ The purchase of the estate subjects the vendee to the payment, or keeping down, of the charge, as an equitable implication from the acceptance of the title. But whether any express covenant or contract, is given to that effect is immaterial; the real estate will be regarded as the primary fund from which the payment is to be made, unless there is some direction, or reasonable implication, in the will, that it shall be made from some other special fund, or that it shall rest upon the same basis as the other debts due from the estate.⁵⁰ But if the incumbrance was created

⁴⁹ *Lechmere v. Charlton*, 15 Ves. 193, 197, 198.

⁵⁰ *Andrews v. Bishop*, 5 Allen, 490. And whether the mortgage was created by the testator or assumed by him on the purchase as part of the consideration, it is held in Pennsylvania primarily payable out of the personal estate.

by the testator, either before or after the making of his will, it must be paid by the executor out of the personalty, unless there is a clear intention indicated by the will, that the devisee shall take the estate cum onere.⁵¹ But it seems that parol evidence is not admissible to show either directly, or by way of presumption and inference, that it was the testator's intention to have an incumbrance upon a devised estate paid out of his personalty, where the presumption of law is otherwise.⁵²

27. The same rule extends to all incumbrances upon land, devised or descended, where the incumbrance is not the proper debt of the devisor or ancestor. The debt or incumbrance remains a charge upon the land merely, and is not entitled to exoneration out of the personal estate, or out of other lands.⁵³ This doctrine * is thus defined by the learned judge, in *Hewes v. Dehon*: "The rule, however, we may remark by way of caution, requiring incumbrances upon the real estate to be paid from the personal property, where no other intent is expressed in

Lennig's Estate, 52 Penn. St. 135. And the widow accepting her share of the personalty in lieu of the provisions of the will has no claim to have such mortgage paid out of the realty. *Ib.*

⁵¹ *Gould v. Winthrop*, 5 R. I. 319; *Hoff's Appeal*, 24 Penn. St. 200.

⁵² *Rapalye v. Rapalye*, 27 Barb. 610. And the intention of the testator to throw the burden of his debts upon specific portions of the estate disposed of in his will, and thereby exempt the residue from such burden, "must be very clearly manifested by the terms used" in the will. *Swann v. Swann*, 5 Jones, Eq. 297.

⁵³ *Hewes v. Dehon*, 3 Gray, 205, 208. In such cases where the incumbrance extends over two or more pieces of property, which are bequeathed to different persons, the creditor may take his remedy against either or both portions of his security as is held in some states, and cannot be compelled, contrary to the terms of his security, to go exclusively against one or any number less than the whole. *Peoples v. Horton*, 39 Miss. 406. But in such cases a court of equity will compel the other devisees to share the burden. See *Maxwell v. Hyslop*, Law Rep. 4 Eq. 407, where the subject is somewhat discussed. See also *Lipscomb v. Lipscomb*, 7 id. 501; s. c. 17 W. R. 252. And where different estates are first mortgaged, and then one of them mortgaged to another party, and then all are mortgaged to still other parties, a court of equity will not compel the first mortgagees to take their debt out of those estates not mortgaged to the second parties, so long as the third mortgagees object. *Wellesley v. Lord Mornington*, 17 W. R. 355, before the Lord Chancellor, *Hatherly*, following *Barues v. Racster*, 1 Y. & C. C. C. 377. See also *In re Mower's Trusts*, Law Rep. 8 Eq. 110, and *Succession of O'Laughlin*, 18 La. Ann. 142.

the will, is to be confined to incumbrances created by the testator or his ancestor, and is not to be extended to cases where the testator or ancestor purchased the estate subject to the incumbrance unless the testator or his ancestor had rendered himself personally liable therefor."

28. But it is not sufficient to make the incumbrance a charge upon the personal estate, that the devisor or ancestor might have been compelled to pay the same, as between himself and the original debtor creating the charge.⁵⁴ For that is always the case as between the grantor and grantee of an incumbered estate.⁵⁵ To have this effect the devisor or ancestor must have assumed the debt as between himself and the creditor in the incumbrance; and it will not be sufficient that he has entered into a bond or covenant with the debtor to see him harmless in regard to it.⁵⁶ The rule is thus expressed by the most distinguished of the American chancellors:⁵⁷ "As to other acts of the purchaser in his lifetime, in order to charge his personal estate as the primary fund, he must make himself, by contract, personally and directly liable at law for the debt to the owner of the incumbrance; and even a covenant or

bond for the purpose will not be sufficient unless accompanied with * 373 circumstances showing a decided *intention* to make thereby the debt personally his own."

29. In England and in the State of New York this matter has been made the occasion of statutory provisions,⁵⁸ by which all incumbrances upon land descended or devised are made a primary charge upon the lands, and not entitled to exoneration out of the personal estate, unless in the case of a will there shall be some "expression of an intention" to that effect, as it is defined in the English statute. In the New York statute it is required to shift this charge, that there shall be an "express direction in the will." Those provisions extend to incumbrances created by the testator or ancestor as well as others. This question came recently before the English courts of equity, in a case⁵⁹ where the incumbrance

⁵⁴ *Scott v. Beecher*, 5 Mad. 96.

⁵⁵ *Campbell v. Shrum*, 3 Watts, 60; *Trevor v. Perkins*, 5 Whart. 244.

⁵⁶ *Tweddell v. Tweddell*, 2 Br. C. C. 101, 152; *Butler v. Butler*, 5 Vesey, 534.

⁵⁷ *Cumberland v. Codrington*, 3 Johns. Ch. 229, 257, 272.

⁵⁸ 17 & 18 Vict. ch. 113; 1 New York Rev. Stat. 749.

⁵⁹ *Woolstencroft v. Woolstencroft*, 6 Jur. N. S. 1170; s. c. 2 DeG., F. & J. 347. The same doctrine maintained in *Brownson v. Lawrence*, Law Rep.

was the proper debt of the testator, and he had directed his executor to pay all his debts. The Vice-Chancellor *Stuart*, held this a sufficient "expression of an intention" to exonerate the land. But the decree was reversed on appeal, by the Lord Chancellor *Campbell*, upon the ground that such formal provisions in a will were not sufficient ground for changing the order of assets in the settlements of estates.

30. The expression of intention which shall be sufficient to control the general intendment of the law, in regard to what fund is liable to the exoneration of an incumbrance upon land devised or descended, has been variously interpreted, at different periods and by different courts. It was at one time held that it required an express declaration to that effect.⁶⁰ But that rule has since been relaxed; and it is now held that if a manifest intention to that effect appears upon the face of the will, it should have the same effect.⁶¹ The Master of the Rolls, Sir *William Grant*, thus expresses the rule, in the last case: "There is no reason whatever, either of justice or convenience, to induce me to depart from the rule laid * down by Lord *Thurlow*, in the *Duke of Ancaster v. * 374 Mayer*,⁶² requiring that in order to exonerate the personal estate, there shall be either express words, or a plain indication of that intention. Indeed, I wish that the rule had been still more strict, and that nothing but express words had been permitted to

6 Eq. 1. In this case the testator directed his executor to pay his debts out of his *estates*. But where the direction is to pay debts out of the personalty it will change the burden from the land. *Eno v. Tatham*, 4 Gif. 181; *Pembroke v. Friend*, 1 J. & H. 132. See also *Coote v. Lowndes*, L. R. 10 Eq. 376. *Forrest v. Prescott*, 18 W. R. 1065. The decision of *Eno v. Tatham*, *supra*, was nullified by statute, 30 & 31 Vic. c. 69. And it has been since held that a direction in the will, that all testators' debts should be paid out of a particular fund arising from the sale of an estate devised for that purpose, was not sufficient to relieve a mortgaged estate from the burden. *Gael v. Fenwick*, 22 W. R. 211. Nor does the specific devise of the mortgaged estate create an exoneration of the mortgage under the English statute, called Locke King's Act, because all the testator's debts are charged upon certain personalty and the residuary real estate. *Sackville v. Smyth*, L. R. 17 Eq. 153. *Brownson v. Lawrance*, *supra*, is here questioned by the Master of the Rolls, Sir *G. Jessel*.

⁶⁰ *Fereyes v. Robertson*, Bunb. 301.

⁶¹ *Watson v. Brickwood*, 9 Vesey, 447, 452.

⁶² 1 Br. C. C. 454. In *Bootle v. Blundell*, 1 Mer. 193, it is said, the will must contain express words for that purpose, or a clearly manifested intention: a declaration plain, a necessary inference, tantamount to express words.

alter the course and order of the law. Originally the rule was so. I find Lord *Nottingham*, in his manuscripts in *Popham v. Bamfield*, expresses himself thus: 'The law charges the debts upon the personal estate, and nothing can discharge it but exclusive and expressly negative words; whether in the case of *hæres factus*, or *hæres natus*.' The burden of proof is always, of course, upon the party claiming to change the order of the law.⁶³ And this expression of intention to change the order of the law must arise from the will and not from extrinsic evidence."⁶⁴

31. The same rule prevails in most of the American states. A learned writer⁶⁵ thus sums up the law upon this point with reference to mortgage debts upon lands devised, but which were upon it when purchased by the testator: "The weight of authority would therefore unquestionably seem to be that the personal estate will not be primarily liable unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own; or has in some other way manifested an intention to throw the burden on the personalty in ease of the land."⁶⁶ The only cases which have attempted to vindicate a different view, are limited to three states, in which chancery law not having formed a distinct branch of judicial administration, the principles of law and equity are to some extent intermingled.⁶⁷

32. It seems never to have been questioned, that the heir-at-law or the general devisee of real estate, encumbered by a mortgage * 375
* 375 gage * created by the devisors, is entitled to have the estate exonerated by the payment of the mortgage out of the personalty, if sufficient for that purpose, together with the other burdens resting upon it.⁶⁸ And it will make no difference that the devisor also bequeaths to another person the balance of his personal

⁶³ *Whieldon v. Spode*, 15 Beav. 537; *Lord v. Wightwick*, 1 Drew. 576.

⁶⁴ *Tait v. Lord Northwick*, 4 Vesey, 816.

⁶⁵ Judge *Hare*, 1 Lead. Cas. in Eq. 505; *Duke of Ancaster v. Mayer*, Am. note.

⁶⁶ *Keyzey's Case*, 9 S. & R. 71; *Halsey v. Reed*, 9 Paige, 446.

⁶⁷ *Hoff's Appeal*, 24 Penn. St. 200; *Mitchell v. Mitchell*, 3 Md. Ch. Decisions, 71; *Thompson v. Thompson*, 4 Ohio, n. s. 333.

⁶⁸ *Plimpton v. Fuller*, 11 Allen, 139. But the mortgagee or alienee of the heir or devisee has no such equity to compel the executor to exonerate the estate by payment of the mortgage. *Keene v. Munn*, 1 C. E. Green, 398. See *Brownson v. Lawrance*, L. R. 6 Eq. 1; *Sackville v. Smith*, 22 W. R. 179; s. c. L. R. 17 Eq. 153, whether the residuary devisee has any claim for exoneration.

estate, after the payment of his just debts, legacies, expenses, and all claims against the estate.⁶⁸

33. It seems to be well settled in the American courts, that real estate devised, which in construction of law amounts to a specific devise, shall not be subjected to the payment of debts, or legacies, specifically charged upon all the real estate, until the real estate not devised is first exhausted.⁶⁹

34. It is a familiar principle in the equitable administration of assets, that where one creditor holds a lien upon two or more securities, and other creditors hold liens upon any of the same securities, but not upon the whole, the former creditor may be compelled first to seek his indemnification out of those securities against which the other creditor has no lien.⁷⁰

35. In an early case,⁷¹ where the administrator had paid over the assets to the distributees or heirs without paying, or retaining for, the debts; it was held the creditors were entitled to payment; first, out of any assets of the estate in the hands of the administrator; secondly, by the heirs or distributees, pro ratâ, not exceeding the whole amount received by them from the estate; and lastly, by the administrator, de bonis propriis.

36. It seems to be a settled rule in marshalling assets in equity, that wherever a charge is paid from a fund not primarily liable to its payment, the party injured thereby is entitled to be subrogated to the rights of the other creditor, and thus enforce the claim against the fund primarily responsible for its payment.⁷² This principle is incidentally illustrated by many of the cases before alluded * to in this chapter. And the principle was * 376 applied in a recent case.⁷³ But the heir who has paid the debts and funeral expenses, as matter of bounty, cannot afterwards claim to be repaid out of the personal estate.⁷⁴ The testator, by his will, directed the sale of certain portions of his real estate for the payment of debts and legacies, and devised the resi-

⁶⁸ *Mitchell v. Mitchell*, 21 Md. 252, 256.

⁷⁰ *Gibson v. Seagrim*, 20 Beav. 614. But a creditor who by superior vigilance discovers funds not otherwise attainable is not bound to blend them in aid of funds specifically appropriated to the payment of his dues and those of other creditors. *Cockerell v. Dickens*, 3 Moore, P. C. C. 98.

⁷¹ *Stroud v. Barnett*, 3 Dana, 391.

⁷² *Johnson v. Child*, 4 Hare, 87.

⁷³ *Lilford v. Keck*, Law Rep. 1 Eq. 347.

⁷⁴ *Coleby v. Coleby*, Law Rep. 2 Eq. 803.

due in trust for the income to be paid to his children during life, &c. The executor deemed it inexpedient to make sale of any portion of the estate, and with the consent of the children, but without any definite agreement with them, leased the whole of the real estate, and applied the income to the payment of debts and legacies. It was held the children were entitled to reimbursement out of the estate.⁷⁵

37. Contracts by the ancestor for erections upon the estate, not performed at his decease, must be carried into effect at the expense of the real estate.⁷⁶

38. It seems to be settled that the testator may, by special directions in his will, render his pure personalty first liable to the payment of legacies generally, or a particular class of legacies, as charitable bequests in particular.⁷⁷ And that where such directions are given, the pure personalty will be regarded as exempted from any charges towards the payment of debts, or funeral or testamentary expenses, or other legacies; and in such case any real estate belonging to the testator in a foreign country will be converted into money, and the proceeds will be treated as a portion of the pure personalty, and applied to the special purposes directed.

39. A widow who has joined with her husband in the mortgage of her separate estate to secure his debt, and which she has paid since his death, for the purpose of exonerating her estate, may prove the amount before the commissioners of insolvency upon his estate. And a creditor of the estate, whose debt is secured by a mortgage of the wife's separate property, may prove his debt against the estate without first relinquishing his mortgage.⁷⁸

40. It seems to be settled in the English courts of equity, that where the testator charges any of his debts "primarily and * 377 exclusively" * upon a specified portion of his real estate, that will have the effect of exonerating his personal estate from the payment of such debts, and the courts will direct the marshalling and administration of the estate accordingly.⁷⁹

41. It seems to be settled in England, that the rule of equity

⁷⁵ *Amory v. Lowell*, 1 Allen, 504.

⁷⁶ *Cooper v. Jarman*, Law Rep. 3 Eq. 98.

⁷⁷ *Beaumont v. Oliveira*, Law Rep. 6 Eq. 534.

⁷⁸ *Savage v. Winchester*, 15 Gray, 453.

⁷⁹ *Forrest v. Prescott*, 18 W. R. 1065.

law by which assets are there marshalled in favor of the different claimants to an estate, as between heir, creditors, devisees, and purchasers, will not be extended, so as to embrace property belonging to the estate situate in other countries; and especially real estate, the title to which is always governed by the law *rei sitæ*, And as to personalty, so long as it remains in a foreign jurisdiction, the rights of creditors and purchasers affecting it will be governed by the law of the place where it is administered.⁸⁰

⁸⁰ *Harrison v. Harrison*, 21 W. R. 490; s. c. L. R. 8 Ch. App. 342. In this case it was deemed essential to a full determination of the cause that the law of Scotland, in regard to certain questions, should be understood by the court. For that purpose the questions were referred to two eminent counsel of the Scottish bar, one of whom was the Lord Advocate, and their opinions, verified by affidavit, were accepted as satisfactory.

RIGHTS OF THE WIDOW.

SECTION I.

DOWER.

1. Of what estates the widow is dowable.
2. What estates are excepted therefrom.
3. The mode of setting out dower.
4. Divorce, a vinculo, bars claim of dower.
5. It may also be barred by will, by jointure, &c.
6. If settlement made during coverture, wife has an election between that and dower.
7. Wife's right of dower more commonly released by deed.
- n. 4. By English statute and that of some states the wife has effective dower only in lands of which husband dies seised. This a wise rule.
8. Different estates of the husband of which the wife is not dowable.
9. How the husband's estate by curtesy is defeated.
10. Equitable assignment of dower. Value of life not affected by decease.
11. Widow barred of dower by lineal warranty.
12. What provision for widow will bar dower.

§ 44. THE law of dower, in all its bearings, is too extensive to receive more than a cursory review, in a work of this character. To consider the subject in its full extent would require a distinct treatise, rather than a single chapter. But we may here briefly group some of the leading points, and such as more commonly arise in regard to that particular estate.

1. It is the estate which the wife acquires, in all the heritable freehold estates of her husband during coverture,¹ in any

¹ In early times the wife was only endowed of such estates as the husband had at the time of the marriage. 2 Black. Comm. 134; Glanv. lib. 6, c. 1, 2. This accounts for the form of endowment in the marriage service of the English Church, "Of all my worldly goods I thee endow," which seems to embrace personalty, as well as lands. And this seems to have been the law of England at an early day. 2 Black. Comm. 134; *Gorham v. Daniels*, 23 Vt.

lands or * tenements. The extent or rather inception of * 379 this estate is more exactly defined in *Magna Charta*,² where it is provided, that the widow shall be allowed to remain in the capital mansion-house of her husband for forty days after his decease, during which time her dower shall be assigned. This is what has been called the widow's quarantine, or forty days, and which has been secured to her by statute in many of the United States.³ And the assignment to the widow by way of dower will be of the use, during her natural life, of one-third of all such

600. And it is said in 4 Kent, Comm. 40, 41, "Dower attaches to all real hereditaments, such as rents, commons, provided the husband is seised of an estate of inheritance in" them. Co. Litt. 32 a. And, in general, it seems to be held, that the wife is entitled to dower in all estates of which the husband was seised during the coverture, and which might be inherited by the children of the wife, without regard to the extent of the husband's interest, provided it were in his own right, and not a merely formal or instantaneous interest. *Gorham v. Daniels*, 23 Vt. 600, and note and cases cited. It has been held that the widow is dowable of an estate which the husband has contracted to sell, but not conveyed, and when the price is not paid. *Day v. Solomon*, 40 Ga. 32. This will depend upon whether, by the statutes of the state, the widow is entitled to dower of all the lands of the husband during the coverture, or only such as he died seised of. For land bargained and sold must be regarded as the estate of the vendee, subject to a lien for the purchase-money. The widow is not entitled to dower in lands of which the husband had only a momentary seisin, in order to quiet the title. *Huginin v. Cochrane*, 51 Ill. 302. The statute of New York expressly provides that the widow of the vendee shall have dower in lands purchased by her husband. *Hicks v. Stebbins*, 3 Lans. 39. In Kentucky the widow is entitled to dower in railway stock owned by her husband at his decease. *Copeland v. Copeland*, 7 Bush, 349. But this is not the general rule of law, and has since been changed by statute in Kentucky. The right of dower, before assignment, is merely a right in action. *Rayner v. Lee*, 20 Mich. 384. A late case in Kentucky, *Butler v. Cheatham*, 8 Bush, 594, seems to give the true definition of what lands of the husband the wife is dowable. They must be such as the husband is seised of during his life. Either *de jure* or *de facto*, and such as the issue of the wife by the marriage might inherit from the husband. The widow, to obtain effective dower in estates mortgaged by the husband, must redeem the mortgage. *Sargeant v. Fuller*, 105 Mass. 119; *Toomey v. McLean*, id. 122. A conveyance of land by the wife during the coverture will not defeat her right of dower in the same land, unless such terms are used as to show that it was intended to release the right of dower, which only attaches upon the decease of the husband, and is not regarded as any estate in the wife during the coverture, but only a possibility. *Marvin v. Smith*, 46 N. Y. 571.

² Cap. 7.

³ Mass. Gen. Stats. c. 96, § 5.

estates, as are subject to dower, of which the husband was seised during the coverture.⁴

2. As dower, at common law, was the continuance to the widow, after the decease of her husband of the use of her husband's real estate, so that she might not be deprived of her comfortable subsistence, there seemed no necessity, in this country, in * 380 order to * reach the substantial objects of the provision, to extend it to lands not under cultivation or in a wilderness state. It was accordingly held, at an early day, in some of the states, that a widow is not entitled to dower in wild lands, unconnected with a cultivated farm.⁵ But she is entitled to dower in land used in connection with cultivated land for fuel,⁶ or for wood and pasture.⁷ But her dowerable right in wood land, will be limited to wood and timber sufficient for the supply of the dower

⁴ In some of the states the widow's dower is restricted to such estates as the husband died seised of. Gen. Stats. Vermont, c. 55, § 1. And by the present English statute of 3 & 4 Will. 4, c. 105, power is given to the husband, in various ways, in his discretion, to bar his wife's right of dower, as by conveyance in his lifetime, by devise or by declaration in his will that his lands shall be exempt from dower. 4 Kent, 51. This is really the only sensible view of the estate of dower, that it should, practically, only extend to such lands as the husband died seised of, or at all events, that the husband should have the power to execute such a conveyance as to defeat the wife's claim of dower, and thus convey the entire estate of both husband and wife. We are surprised that a larger number and proportion of the American states should not have adopted something analogous to the statute in Vermont, or the English statute of William IV., which will relieve conveyances of land from the necessity of joining the wife, which, as it must always be done, and is never refused by the wife, becomes, in almost every case, mere form. But the force in favor of women's rights is now at such a high point, that the tendency will probably be in the opposite direction. And we know it might, possibly, in one instance out of a thousand, enable the wife to compel a settlement in her own favor, which she might not otherwise obtain. But it seems scarcely reasonable to produce needless embarrassment, expense, and delay, in nine hundred and ninety-nine will cases, in order to reach some possible benefit in a single case. It would be more sensible, and far more available, to make some special provision to reach the exceptional cases, by petition to the courts of equity, to compel a reasonable settlement out of the husband's estate, for the maintenance of his wife and family, where there existed any necessity for it.

⁵ *Conner v. Shepherd*, 15 Mass. 164; *Webb v. Townshend*, 1 Pick. 21; *White v. Cutler*, 17 Pick. 248.

⁶ *White v. Willis*, 7 Pick. 143.

⁷ *Shattuck v. Gragg*, 23 Pick. 88.

estate,⁸ so it has been held the widow is entitled to dower in a slate quarry.⁹ But not in lands bought for the use of a partnership of which her husband was a member,¹⁰ even where the title is so conveyed as to create a tenancy in common between the partners.¹¹ And the widow is dowable in lands mortgaged by the husband, without reference to the effect upon the completeness of the security, her right of dower being paramount to all other claims, unless she have released it, or the right be limited by statute to land of which the husband dies seised. (a)

3. The right of the widow may be assigned orally, it has been held.¹² But this is not the most usual mode of assignment, at the present day; that being effected, under the statutes, in most of the states, by means of commissioners appointed by the probate court, to which a return is regularly made, and becomes matter of record or permanent registry there, and also, frequently, in the registry of deeds, although neither is probably indispensable to the right of the widow, so long as she continues to have possession of the same.¹³

4. The widow may be barred of dower in many ways. It seems agreed that where the wife is guilty of adultery and elopement, this will be an effectual bar to her claim of dower, under the English statute.¹⁴ And this statute, at an early day, seems to have been considered in force, in some of the American states, by virtue of

⁸ *White v. Cutler*, 17 Pick. 248.

⁹ *Billings v. Taylor*, 10 Pick. 460.

¹⁰ *Howard v. Bent*, 5 Met. 582.

¹¹ *Dyer v. Clark*, 5 Met. 562. But after the payment of all the partnership debts and the discharge of all liens upon the partnership property, growing out of the partnership, there seems no reason why the widow of any partner may not be entitled to dower in any land remaining undisposed of. *Dyer v. Clark*, *supra*; *Parsons on Part.* 372, 373. So an election which cannot be carried fully into effect will not bind her. *Richart v. Richart*, 30 Iowa, 465. Devisees disappointed by the widow's election of dower are entitled to compensation out of the provisions in the will abandoned by her. *Jennings v. Jennings*, 21 Ohio, N. S. 56.

(a) *James v. Fields*, 5 Heisk. 394; *Gregg v. Jones*, *id.* 443; *Turbeville v. Gibson*, *id.* 565.

¹² *Conant v. Little*, 1 Pick. 189; *Shattuck v. Gragg*, 23 Pick. 88; *Blood v. Blood*, *id.* 80.

¹³ *Tilson v. Thompson*, 10 Pick. 359. It is not important to set out the details of proceedings for the assignment of dower, as they depend exclusively upon statutory provisions, which vary essentially in the different states.

¹⁴ 13 Edw. 1, ch. 34.

silent adoption or acquiescence, as has been held to be the fact, in regard to many of the early English statutes.¹⁵ But the more recent examination of the subject has led to the more judicious conclusion, that * where the entire subject of the law of dower is reduced to statutory provisions, as in most of the states at the present time, and no exclusion of this kind is found in the statute, it cannot be regarded as a valid bar to the wife's claim for dower, the husband having virtually acquiesced in this construction, by not procuring a final divorce a vinculo, as he might at any time do in such case, by the law of all the states.¹⁶ And there seems no ground to question that the actual divorce a vinculo will effectually bar all claim of dower by the wife.¹⁷

5. The right of the widow to dower in her husband's estate may also be effectually barred by accepting the provision provided by her husband's will, and expressly, or by fair implication, made in lieu of dower; or by a jointure or settlement, made in contemplation of marriage, and provided to be in lieu of all claim of dower in her husband's estate. But a jointure or marriage settlement, in order to have the effect to bar the widow's claim of dower in her husband's estate, must be adequate to her support, or at all events a fair equivalent to the dower in her husband's estate.¹⁸ An adult woman cannot, before marriage, contract for the relinquishment of her dower, without an adequate provision, or due compensation. The law will not tolerate such a contract.¹⁹

6. By the English statute,²⁰ and the same provision exists in the New York statute,²¹ if the settlement, in lieu of dower, was made upon the wife during coverture, she had her election, after the decease of her husband, whether to accept it, or take dower in her

¹⁵ *Welman v. Nutting*, 2 Dane's Ab. 305.

¹⁶ *Lakin v. Lakin*, 2 Allen, 45. But see *McAllister v. Novenger*, 54 Mo. 251.

¹⁷ 2 Bl. Comm. 130; 4 Kent, Comm. 54; *Walters v. Jordan*, 13 Ired. Law, 361; *Pitts v. Pitts*, 52 N. Y. 593; *Calame v. Calame*, 24 N. J. Eq. 440.

¹⁸ *Drury v. Drury*, 3 Br. P. C. 492; *M'Cartee v. Teller*, 2 Paige, 511. But a widow who elects to accept her provision under the will, or a sum of money, in lieu of dower, under the belief that the estate is solvent, will be allowed to make a new election upon it appearing that the estate is insolvent. *Dabney v. Bailey*, 42 Ga. 521.

¹⁹ *Power v. Sheil*, 1 Molloy, 296; 4 Kent, Comm. 36.

²⁰ 27 Hen. 8.

²¹ 4 Kent, Comm. 56.

husband's estate. And if she were evicted from any portion of the lands so settled upon her she was by the same statute entitled to have the deficiency made up to her out of her husband's estate.²¹

7. The usual mode of the wife's barring dower, in that portion of her husband's estate conveyed by him during coverture, is to join with him in the deed, in such form of conveyance, as to express the purpose of relinquishing her right of dower or conveying her whole interest therein.²²

* 8. It may be convenient for the profession, that we * 382 should here indicate briefly, of what estates in the husband the wife is not dowable.

(1.) At common law and under the early English statutes dower does not attach to estates in joint tenancy.²³ Nor does the right of dower attach to a momentary seisin, where the husband mortgages back the land to secure the purchase-money or a portion of it, at the same time it is conveyed to him.²⁴

(2.) The husband must be beneficially seised in his own right, although but for an instant, to create the right of dower in the wife.²⁵

(3.) But seisin as trustee creates no right of dower,²⁶ since the seisin must be in the personal and private right of the husband.²⁷

(4.) It seems to have been held, at common law, that the wife was not entitled to dower in an equity of redemption, and the efforts of some of the English judges, in equity, to restore this exclusion of the wife's dower to something like reason, proved abortive.²⁸ But in the United States there seems never to have

²² *Catlin v. Ware*, 9 Mass. 218; *Lufkin v. Curtis*, 13 id. 223; *Powell v. M. & B. Man. Co.* 3 Mason, 347. The deed of the wife alone is sufficient to bar her claim of dower. *Page v. Page*, 6 Cush. 196. In New Hampshire, it is sufficient if the wife sign and seal the husband's deed. *Burge v. Smith*, 7 Foster, 332; *Dundas v. Hitchcock*, 12 How. U. S. 256.

²³ 4 Kent, Comm. 37; Litt. § 45; *Mayburry v. Brien*, 15 Pet. U. S. 21.

²⁴ *Mayburry v. Brien*, supra. See also 4 Kent, Comm. 38, 39, and authorities cited. Co. Litt. c. 5, § 16; F. N. B. 147.

²⁵ 4 Kent, Comm. 39; Co. Litt. 31 b; *Nash v. Preston*, Cro. Car. 190.

²⁶ *Sneyd v. Sneyd*, 1 Atk. 442; 4 Kent, Comm. 39, and notes.

²⁷ But at common law the wife might, it is said, 4 Kent, Comm. 42, claim dower in a trust estate. But the courts of equity, deeming it inequitable, enjoined her from it.

²⁸ *Banks v. Sutton*, 2 P. Wms. 700; *Chaplin v. Chaplin*, 3 id. 229.

been entertained any serious question upon this point. And in many of the states it is affirmed by statute,²⁹ the widow of course assuming her proportion of the incumbrance.

(5.) And it seems to be equally well settled in the American states, that the wife of the mortgagee is not entitled to dower, even after the law-day, given for redemption, is passed, and the estate in strict legal intendment becomes absolute,³⁰ or until an absolute foreclosure of the title of the mortgagee, or an entry for foreclosure, at the very least. The wife of the mortgagee can

* 383 claim no right of * dower before this. As the interest of the mortgagee is regarded as a mere chattel, until after absolute foreclosure the wife could have no absolute and perfected right of dower until that event transpires. And in strictness this must have occurred during the life of the husband, as the rights of all parties claiming the estate of a deceased person, whether as heir or distributee, attach upon the decease and cannot be affected by subsequent events. In this view, if at the time of the decease of the mortgagee, the estate is still redeemable, it is but a chattel interest and as such goes to the widow and next of kin, as personalty. And if, at that time a decree for foreclosure is open, the interest being mere personalty, but by lapse of time, after the decease, the decree becomes absolute and thus transfers the estate in the lands in payment of the mortgage money, by mere operation of law, the interest will still be regarded as personalty and distributed as such.

9. On the other hand, the estate of the wife in her own lands may be such as to exclude all right to an estate by curtesy on the part of her husband, upon her decease before him. This will be the case in regard to lands conveyed to the wife during the coverture for her exclusive use, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have the lands for his life, in case he survived her; but that they should, upon the wife's death, go to her heirs.³¹ So where the husband held an estate in trust for the separate use of his wife as a feme sole, so that the same shall not be in the power or subject to any debt, contract, or engagement of the husband, it was held he could

²⁹ 4 Kent, Comm. 44, 45, and notes.

³⁰ 4 Kent, Comm. 47, and notes; *Runyan v. Mersereau*, 11 Johns. 534.

³¹ *Bennet v. Davis*, 2 Peere Williams, 316.

have no estate by curtesy, after her decease.³² And in a late case,³³ where the father, in consideration of love and affection, conveyed land to his daughter, being a feme covert, upon condition that it should be for her sole use and free from the control of her husband, and she deceased before her husband, having devised the same to her children, it was held the husband could claim no estate therein.

10. Where the widow is allowed by the heirs to occupy the mansion-house and other lands in which she is entitled to dower, and after many years brings a bill in equity for the assignment of dower, she must account for the use of the mansion-house and land occupied by her, deducting therefrom the use of her claim of dower. Allowing the widow to occupy the real estate of her husband and to appropriate to her own use one-third of the rents and profits amounts to an equitable assignment of dower. Where the whole real estate is ordered to be sold and the widow agrees to accept a gross sum in lieu of dower, if she dies before the sale of the estate her title is thereby determined. But the value of her life is not affected by her decease before the payment of the agreed sum.³⁴ The assignment of dower may be set aside because it is excessive,³⁵ or where made in an improper manner, as by dividing a house without reference to the rooms, and thus rendering portions of it useless.³⁶

11. A widow may be barred of her dower in lands by reason of the covenant of her ancestor from whom she has received an estate by way of devise or descent to more than the value of her dower in the estate warranted by such ancestor,³⁷ upon the principle of lineal warranty and to save circuity of action.

12. By the English Dower Act,³⁸ the widow is not entitled to dower in any land "which shall have been absolutely disposed of by her husband in his lifetime or by his will." Under this statute a devise of all the testator's land and the bequest of all

³² *Stokes v. M'Kibbin*, 13 Penn. St. 267.

³³ *Pool v. Blakie*, 3 Chicago Legal News, 282.

³⁴ *McLaughlin v. McLaughlin*, 5 C. E. Green, 190.

³⁵ *Macknet v. Macknet*, 24 N. J. Eq. 449.

³⁶ *Stewart v. Smith*; 4 Abb. N. Y. App. Decis. 306. Dower in several parcels of land may be assigned wholly in one parcel. *Alderson v. Henderson*, 5 W. Va. 182.

³⁷ *Russ v. Perry*, 49 N. H. 547.

³⁸ 3 & 4 Wm. 4, c. 105.

his personalty to trustees, to convert into money and pay an annuity to his widow, and the remainder, above all debts, charges, and expenses, for the benefit of his children, is such a disposition as will bar all right of dower in the widow.³⁹ And, in general, it may be said that any disposition of all the husband's estate, especially if made by will, and which embraces a provision for the support of the widow, must be regarded as intended by him in lieu of dower, and will put the widow to her election whether to take under or against the provision.⁴⁰ And where the election is provided by statute it must be strictly followed, and no misinformation as to the time or change in the condition of the estate will enable a court of equity to extend the statutory term for the election.⁴⁰

SECTION II.

PROVISION FOR THE WIDOW AND FAMILY OF THE DECEASED, UNTIL THEIR PORTIONS IN THE ESTATE CAN BE SO ASSIGNED AS TO AFFORD THEM THE MEANS OF SUPPORT.

The provisions in different states very different. Instances, Vermont, Massachusetts.

1. Much, if not all, of this provision in Massachusetts is limited to forty days.
2. The comments of Chief Justice *Shaw* in regard to the meaning of the provision.
3. By allowing successive orders, under the statute, in another case, it is obviously extended beyond forty days.
4. In another case it is restricted to actual, pressing necessities.
5. In another case *Thomas, J.*, says the provision for necessities and the quarantine are put on the same ground.
6. This and similar provisions limited to the necessary expense of supporting the widow and family, for a short time, in the state they had been accustomed to live.
7. Construction of necessary furniture and provisions.
8. This claim of the widow not barred by marriage settlement.
9. Direction to executor to furnish support to family cannot be performed by another in case of his neglect or refusal.

³⁹ *Leney v. Hill*, L. R. 19 Eq. 346.

⁴⁰ *Stephens v. Gibbes*, 14 Fla. 331; *Wilson v. Cox*, 49 Miss. 538; *Waterbury v. Netherland*, 6 Heisk. 512. But the widow is not barred of dower even by her own release to the purchaser, when the land is claimed by title independent of the release, as by a prior attachment and levy. *French v. Crosby*, 61 Me. 502. See also *Ridgway v. Masting*, 23 Ohio, N. S. 294.

§ 45. THIS is entirely a statutory provision in the American states, and is of very unequal duration in its extent, as to time. In some of the states it extends to the whole of the first year after the decease of the intestate.¹ The Massachusetts statute seems as *indefinite, in regard to time and amount, as * 384 possible, almost. It embraces “such parts of the personal estate” of the deceased, as the probate court, having regard to all the circumstances of the case, “may allow, *as necessities*, to his widow, for herself and family under her care, or if there is no widow, to his minor children, not exceeding fifty dollars to any child; and also such *provisions and other articles as are necessary* for the reasonable sustenance of his family, and the use of his house and furniture therein, for forty days after his death.” All this the statute provides “shall not be taken as assets for the payment of debts, legacies,” &c.²

1. The former portion of the provision, denominated “necessaries” for the widow and family, is not, by necessary construction, limited to the widow’s quarantine; but the “provisions and other articles,” for the support of the family, do seem to be limited to the probable needs of the family, during the forty days they are allowed to occupy the mansion-house of the deceased, and as there is no other possible limitation upon the former portion of the provision, and it seems all to be of precisely the same character, it might appear questionable, whether that might not have been the original intention of the statute. And it is certain the grammatical construction will very naturally admit of this limitation.

2. But the courts do not seem to have indicated this construction. In *Adams v. Adams*,³ Chief Justice *Shaw* says, “We are satisfied with the views of the revising commissioners on this subject — where they say the allowance for necessities, is not intended as compensation for any injuries the widow may have sustained, or be exposed to, by the distribution of the estate, either by will or under the statute; ‘but merely to furnish her with a reasonable

¹ Gen. Stats. Vt. 385, where it is provided for an assignment of what the probate court deems a reasonable allowance for the support of the widow and children, constituting the family of the deceased, according to their circumstances, for their maintenance during the progress of the settlement of the estate, which in the case of an insolvent estate shall not be longer than eight months.

² Gen. Stats. Mass. ch. 96, § 5.

³ 10 Met. 170.

maintenance, *for a few weeks*, and with some articles of necessary furniture, when she is not otherwise provided with them.'” And further this learned judge says, “This provision is intended for the *present relief of the widow*, for the maintenance of herself and children. That it is temporary in its nature and personal in its character, and confers no absolute or contingent right of property.”

“As a small temporary personal allowance to a widow left
* 385 in distress * by the decease of her husband, out of articles of little value, most useful to her, but which would do very little towards increasing the fund for creditors, *till some arrangement can be made*, it is an equitable provision.”³

3. The same court, in a later case,⁴ by holding that it is competent for the probate court to make more than one allowance of this kind, provided the estate has not been already legally disposed of in payment of debts, or otherwise, seem, very clearly, to have indicated, that there is no sufficient reason, or ground, for restricting it to the term of forty days.

4. And in a still later case,⁵ it was held by the same court, that a widow who had lived separate from her husband, and had all her separate property, considerable in amount, secured to herself, for many years before her husband's death, and who had no children, was not entitled to any assignment under this provision of the statute. Chief Justice *Shaw* says, in giving judgment in the last case: “The purpose of the statute, we think, is, to make a personal allowance to her, to meet those necessities” — the demand for necessaries to support the household immediately after the decease of her husband, and in some cases before administration can be granted. “The assignment is not made to the widow, as a reward for faithful services as a wife, — nor as compensation for her ill treatment, — but it is a question solely of her *actual necessities*.”

5. In a later case⁶ *Thomas, J.*, said, “The allowance for necessities, for the widow, for the use of herself and family under her care; and that of sustenance of the family, for forty days after his death, are put on the same ground.” And the court here held they applied as well to cases where provision is made for the widow by the will of her husband, as to other cases.

6. From all this, and the fact that in other states, where a simi-

⁴ *Hale v. Hale*, 1 Gray, 518.

⁵ *Hollenbeck v. Pixley*, 3 Gray, 521.

⁶ *Williams v. Williams*, 5 Gray, 24.

lar provision, or one analogous to it, exists, it is restricted in its operation to the necessary expenses of the support of the family during the settlement of the estate, or until a partial or final distribution of the assets can be reached, we must come to the conclusion, we think, that it is so in Massachusetts. It is a provision * to give the widow such provisions in and about * 386 the mansion-house of the deceased and such furniture as she may desire to use during the forty days of her occupancy. For unless this is done, the right to occupy the house will be of comparatively little use. And as the widow will require something to meet the necessities of maintaining herself and family, besides the use of the house and such provisions and necessary furniture as were on hand at the decease of the husband, there is a further appropriation to be made by the Judge of Probate, to meet such probable necessities. But as ordinarily a partial distribution of the personalty may be made, within the first few months, as well as the assignment of dower, so as to enable the widow and family to live upon their own means, where the estate is solvent; and in other cases, such assignment to the widow will have to come out of the creditors, and the statute makes no distinction between solvent and insolvent estates as to this assignment to the widow, the probate courts will naturally restrict it, within the narrow limits of actual necessity, for reasonable and comfortable maintenance and support, according to the circumstances and condition of the deceased; which must naturally point, in the majority of cases, to his former mode of living, unless there is some very obvious indication, that he had been accustomed to live, either beyond his means, or the reasonable demands of comfort.⁷

7. Where the statute provided for the widow "necessary bedding and furniture," for herself and family, and necessary provisions for one year, it was held to embrace sufficient to enable her to keep up her domestic establishment in the same, or a similar mode, it had been before kept. In this view, where the husband deceased,

⁷ In the case of *Hale v. Hale*, 1 Gray, 520, it is claimed by counsel, that the rule laid down by Chief Justice *Shaw*, in *Adams v. Adams*, 10 Met. 170, had not been followed in practice in the inferior courts, or before single judges of the Supreme Judicial Court, and that, in fact, it had been overruled by the full court in *Whiting v. Whiting*, Berkshire, 1847, where a decree allowing \$1200, out of an estate of \$22,000, was affirmed. But the case is not reported, and no allusion seems to be made to it in the later cases.

leaving an estate valued at half a million dollars, and four children, and one foster child, a housekeeper, cook, and man-servant, besides the widow, \$400 in bedding, \$1600 in furniture, and \$1500 in provisions was not regarded as excessive.⁸

8. It has been held, that the widow is not precluded from petitioning for this temporary allowance out of her husband's estate, by reason of a marriage settlement, whereby she released all claim upon his estate.⁹

9. The provision in the will of the testator directing the executor to provide for the support of the family till the estate should be distributed, will not justify any other person furnishing the support and recovering the amount of the executor in case of his neglect or refusal.¹⁰ The remedy is in equity against the party in default.¹⁰

SECTION III.

THE WIDOW'S DISTRIBUTIVE SHARE IN HER HUSBAND'S ESTATE.

1. The widow entitled to one-third the personalty, and if no children, to one-half.
- 2 and n. 3. This may be barred by settlement, or provision, before or during coverture.
3. A covenant by the husband to leave the wife a portion, if she survive, satisfied by her distributive share in his estate.
- *387 *4 and n. 3. And it will make no difference that the distribution comes by lapse.
5. Satisfaction of such covenant held not equivalent to performance. Query.
6. But if the money under the covenant were to be paid at any precise period, and especially if the period occurs during the life of the husband, so as to constitute a debt against his estate, it will not be satisfied by a distributive share in his estate.
7. Special customs in England of no interest here.
8. Construction of will with reference to widow renouncing provision for her under the will.
9. The rights of the widow in case of mental incapacity.
10. Widow entitled to her share, even where marriage voidable.

§ 46. 1. UNDER the English statute of distribution, and the statutes of most of the American states are similar in their provisions in that respect, the widow is entitled to one-third of the personal estate, where there are children, and where there are not,

⁸ *Strawn v. Strawn*, 53 Ill. 263.

⁹ *Blackinton v. Blackinton*, 110 Mass. 461.

¹⁰ *Reid v. Porter*, 54 Mo. 265.

to one-half, the other half going to the next of kin. But if there are no such kindred, the other half vests in the crown.¹

2. But the widow's right to a distributive share in her husband's estate, as we have seen in regard to dower,² may be barred by a settlement or provision, either before or during coverture.³ And it seems to be well established, in the English courts of equity, that a settlement upon the wife in contemplation of marriage, being an infant, made with the approbation of her parents, or guardians, will bar her claim of any portion of her husband's personalty, when so provided³ in the settlement.

* 3. And where the husband covenants to settle upon or * 388 leave his widow, or that his executors shall pay her, a portion of or out of his personal estate, and then dies intestate, so that she becomes entitled to a portion of his personal estate under the statute, such distributive share is regarded as in performance of the covenant, either *in toto* or *pro tanto*.⁴

¹ Cave v. Roberts, 8 Sim. 214.

² Ante, § 44.

³ Drury v. Drury, 3 Br. P. C. 492; s. c. 2 Eden, 39; s. c. 4 Br. C. C. in n. 506. See also Gurly v. Gurly, 8 Cl. & Fin. 743. And this bar of the widow's right to the personalty of her husband will, in general, operate, although the provision made by the husband for the disposition of his personalty should lapse. 2 Wms. Exrs. 1342. But where the provision excluding the widow is made by the will of the husband, and he thereby declares it to be in lieu and in bar of all the wife's claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the personalty is still subject to distribution, then, notwithstanding the will, the widow is entitled to a share under the statute. Pickering v. Stamford, 3 Vesey, 332; Garthshore v. Chalie, 10 Vesey, 17, 18. The reason of this distinction seems to be, that where the wife, in consideration of an adequate settlement before marriage, covenants to relinquish her claim to her husband's estate, real or personal, or both, she is bound, by the covenant, as an effectual bar, notwithstanding the disposition the husband may attempt to make of the same, by will or otherwise, may lapse or fail of going into operation; but where the bar upon the wife's claim arises solely by reason of the provisions of the will of the husband, it is presumed, in law, that the testator purposed the exclusion of the wife, only in order to carry into effect the subsequent disposition of the estate; and that when that fails, the exclusion of the wife should also cease, since the sole foundation upon which it rested has been removed. Colleton v. Garth, 6 Sim. 19.

⁴ Blandy v. Widmore, 1 P. Wms. 324; s. c. 2 Vernon, 709; Lee v. D'Aranda, 1 Ves. Sen. 1; s. c. 3 Atk. 419. Garthshore v. Chalie, 10 Vesey, 1. And it will make no difference that the money under the covenant was to be paid before the end of the year from the husband's decease, the distributive share not being due till the end of the year, *ib.*

4. And it will make no difference that the husband provides by his will that his executors shall distribute his personal estate as to them shall appear right, and they renounce the trust, whereby it becomes distributable, as in cases of intestacy, the share falling to the wife, in this case equally as in ordinary cases, will go in discharge of any covenant by the husband to leave or that his executors shall pay his widow a portion out of his personalty.⁵

5. But it has been held that if part of the provision under the covenant be such, that it cannot be performed by the widow's distributive share in her husband's estate, as where she was to have a portion of the sum absolutely, and only the interest of the remainder during life, that in such case the courts will not undertake to divide the covenant, and will therefore not regard any portion of it as satisfied by it.⁶ But the foregoing case goes upon the distinction between performance of the covenant, strictly, and satisfaction, which it seems to have been considered could not be admitted. But the distinction was doubted by Lord *Thurlow*,⁷ and there is no reason to suppose it would be regarded, at the present time, by any of the American courts. The annuity arising from the interest might be satisfied by the distributive share, as well as a gross sum.

6. But it has been held, that if the covenant were to pay the wife a sum of money during his life so that it had become a debt * 389 before * his death; or where it was to be paid in two years after the marriage and the husband obtained an extension of the time of payment and then deceased, without payment, and the wife's distributive share in his estate exceeded the amount due under the covenant, it was held no performance or satisfaction of the covenant.⁸ The distinction is, perhaps, rather nice, but we do not perceive any good ground to question it.⁹

7. There are some peculiar customs prevailing in different portions of England, as in London and York, whereby the distributive share of the widow in her husband's estate is, more or less, affected.¹⁰ But we do not perceive that the consideration of the

⁵ *Goldsmid v. Goldsmid*, 1 Swanst. 211.

⁶ *Couch v. Stratton*, 4 Vesey, 391. We are not surprised that so sensible a judge as V. C. *Wigram* reluctantly followed the authority of this case, in *Salisbury v. Salisbury*, 6 Hare, 526.

⁷ *Kirkman v. Kirkman*, 2 Br. C. C. 95.

⁸ *Oliver v. Brickland*, cited, 3 Atk. 420.

⁹ *Lang v. Lang*, 8 Sim. 451.

¹⁰ 2 Wms. Exrs. 1379-1381.

cases affected by such customs could be of any interest to the profession in this country.

8. Where the widow renounces the provision of her husband's will, and there is not enough personalty to pay the legacies in full, that will not abridge her claim to dower and share of personalty under the statute of distributions.¹¹ This claim of the widow, after renouncing the provisions of the will, being paramount, the will must be construed the same, as if the portion of the estate going to her did not form part of it.¹¹

9. The right of the widow to waive the provisions of her husband's will, under the statute, is one so strictly personal, that it has been held, where she was insane, that neither she nor her guardian could exercise it.¹² This unquestionably presents a somewhat perplexing question, since the widow might, for special reasons, entirely personal to herself, prefer to abide by the provisions of her husband's will, however inadequate they might be in proportion to her rights in his estate independent of the will. And if a guardian were allowed to exercise the right on her behalf, and she should subsequently be restored to mental capacity, it might appear that the action of the guardian would prove excessively distasteful to her. But we think, either by express provision or construction, her rights should be, in some way, more effectually provided for, in this respect, than they seem to be at present, in most of the states. A provision saving her rights for a longer term in case of mental incapacity and ultimately referring the matter, where the incapacity continued, to the discretion of the probate court, or some other arrangement might save the rights of all concerned.

10. It is but seldom that any question arises, in regard to the claimant being, in fact, the widow of the decedent. But in one case, where the decedent was married to the claimant while insane, and continued so till the time of his death, it was held, that, although the marriage might have been avoided, during the life of the parties, by proceedings for that end, yet that not having been done, the widow was entitled to be recognized as such in the settlement of the estate, the probate court having no jurisdiction to determine the question, except in cases when the marriage was absolutely void.¹³ And questions of this kind may arise where the

¹¹ *Bard's Estate*, 58 Penn. St. 393.

¹² *Pinkerton v. Sargent*, 102 Mass. 568.

¹³ *Wiser v. Lockwood's Estate*, 42 Vt. 720.

parties have been formally divorced, by a court claimed to have no jurisdiction of the parties or the subject-matter, one or both, and some other cases, probably.

SECTION IV.

HOMESTEAD FOR WIDOW AND FAMILY.

1. Definition of the character of the estate.
2. Mode of securing it to the widow.
3. The husband cannot dispose of this interest by will.
4. What essential to creating the estate.
5. From what time contracts affected by it.
6. How the estate may be abandoned.
7. The wife may retain the homestead interest after divorce.
8. The children have no vested interest in the homestead. It may be released by the mother. On decease of father, vests in widow and children, or either.
9. Homestead interest subject to payment of purchase-money.

§ 46 *a*. 1. THE homestead is a statutory exemption of a certain amount of real estate, purchased and occupied for a home, by a man having a family, from the claim of his creditors to be paid their just debts out of his property. This interest is commonly secured to the widow and family, after the decease of the husband and father.

2. It is more commonly defined by the amount of its value, and when any emergency arises requiring its separation from a larger estate, occupied in connection with it, this may generally be done by metes and bounds. But where the lands of a decedent are incapable of division, the widow's interest has been held to be payable out of the proceeds of the sale.¹

3. The homestead estate, secured by statute for the maintenance and support of the family, is one which the husband cannot dispose of by his will.² *Aldis*, J., here said: "The intent of the homestead act is to create a home for the poor debtor and his family, which shall not be liable for his debts, and which upon the death of the husband shall descend to the widow and minor children." . . . "We have no doubt" she is then "at liberty to renounce the provisions of the will, and elect to have her homestead and her dower."

¹ *Lehman v. Dorety*, 8 Leg. Int. Repts. 623.

² *Meech v. Meech*, 37 Vt. 414.

4. Where the homestead is secured to "every housekeeper or head of a family," it will extend to a single man whose indigent mother and sisters live with him, as well as those who have wives and children, one or both.³ But not where he has only servants in the house. (a) There can be no homestead without a dwelling-house.⁴

5. The homestead acts operate only upon contracts subsequently made. Where a new note secured by mortgage is taken subsequent to the passing of the act, for a note existing before the act, but not secured by mortgage, it will be affected by the act.⁵ But the right of a surety against his principal, for indemnity, dates from the time of his becoming surety, and not from the time of his being damnified.⁶

6. A party removing into another state, and there obtaining no homestead, will retain his homestead rights in the state from which he removes, so long as the *animus revertendi* remains.⁷ And when the homestead is sold and the price invested in other property of the same nature, the homestead character attaches to the new purchase.⁸

7. In Illinois⁹ it has been held that a divorced wife, not being herself in fault, to whom the custody of the children is decreed, becomes the head of the family, under the statute, and retains the homestead interest. But this seems to admit of question.

8. The children of the family have no vested interest in the homestead, but it may be controlled by the parents, or may be released by the mother.¹⁰ But upon the decease of the husband and father, the estate vests in the widow and children, or either.¹¹

9. There is no right in the widow or children to assert any homestead claim as against the payment of the purchase-money for such homestead.¹²

³ *Marsh v. Lazenby*, 41 Ga. 153.

(a) *Calhoun v. McLendon*, 42 Ga. 405.

⁴ *Coolidge v. Wells*, 20 Mich. 79.

⁵ *Adams v. Jenkins*, 16 Gray, 146.

⁶ *Rice v. Southgate*, 16 Gray, 142.

⁷ *Cippery v. Rhodes*, 53 Ill. 346; *Woodward v. Till*, 1 Mich. N. P. 210; *Wiggins v. Chance*, 54 Ill. 175.

⁸ *Robb v. McBride*, 28 Iowa, 386.

⁹ *Bonnell v. Smith*, 53 Ill. 375.

¹⁰ *Clubb v. Wise*, 64 Ill. 157.

¹¹ *Skouten v. Wood*, 57 Mo. 380.

¹² *Bush v. Scott*, 76 Ill. 524.

* 393 * CHAPTER XV.

ALLOWANCES TO THE PERSONAL REPRESENTATIVE, AND FINAL
- ACCOUNT.

1. The personal representative is responsible for the estate to the same extent as other trustees.
2. Moneys deposited in bank, not at his risk unless mingled with his own.
3. But if there be any improper dealing with such moneys, good faith will be no excuse.

Illustration of the point by Lord *Cottenham*, Chancellor.

4. Specification of numerous instances of the default of such trustees, and the contrary. Contracts for permanent building performed after the death of the decedent.
5. Are not responsible for interest unless they have, or ought to have received it.
6. Where the trustee puts the money to his own use he will be subjected to compound interest.
 - n. 13. Summary of the decisions as to the payment of interest by the executor or administrator.
7. And if he realizes profit beyond that he must account for the whole.
8. The cestui que trust may follow the fund into the hands of third parties. Rate of interest.
9. Trustee sometimes excused from paying interest, if acting under bonâ fide mistake.
10. And the trustee, where he adventures the trust fund, is responsible for all consequences good or bad.
11. Personal representative cannot make any bargain, affecting the estate, for his own advantage.
12. Statement of the law, as to the responsibility of trustees, by *Walworth*, Chancellor.
13. In New York the personal representative is allowed a reasonable time without paying interest.
14. The personal representative entitled to interest on necessary advances for the estate.
15. Circumstances under which the personal representative is chargeable with interest.
16. The executor not chargeable with interest where the cestui que trust unreasonably delays his claim.
17. The rule as stated by Chief Justice *Williams*, of Vermont.
18. The rule as laid down in Connecticut; and by Mr. Justice *McLean*.
- 19 and n. 43. The rule of the English law in regard to compensation to trustees for personal services. Not allowed there.
20. Nothing allowed trustees in England by way of commissions.
21. In the Colonies a different rule prevails as matter of necessity.
22. The American courts have attempted to adapt the law to circumstances.

- * 23. In New York a commission of five per cent is allowed on all moneys * 394 received and paid out.
- 24. The same rule has been extensively adopted in other states.
- 25, 26. The adjudications of the probate courts upon the accounts of executors and administrators conclusive upon all matters directly adjudicated.
- 27. Sometimes probate courts may enforce final decrees, by proceedings as for contempt.
- 28. But this should not be done, where the decree is merely for the payment of money.
- 29. It only applies to such special and specific matters, as it is in the power of the defendant to do, and which are requisite to good faith and fair dealing, and are indispensable to orderly procedure in the court.
- 30. The personal representative entitled to retain assets to meet debts and pecuniary legacies.
- 31. Not responsible for loss except through his fault.
- 32. Cannot be allowed for support of infant children.
- 33. Counsel fees, expense of auctioneers and clerks, chargeable where necessary to protect the interests of the estate.
- n. 71. Conclusiveness of administration accounts.
- 34. What expenses the husband as administrator of the wife may charge her estate, after a will is established.
- 35. Responsibility of an executor who is surviving partner of the testator.
- 36. Can only be called to account in probate court.
- 37. Bound to charge himself with his own indebtedness to the estate.
- 38. When entitled to a rebate in his account.
- 39. Errors in primary account corrected in final account.
- 40. Waiver of notice recited in the decree.
- 41. Effect of decree in another state.
- 42. The executor not responsible for the misconduct of solicitor.
- 43. Debt of distributee may be retained.

§ 47. 1. It will be convenient first to consider the extent of the responsibility of the executor or administrator, for the preservation of the estate of the decedent. He is liable only for want of due care and watchfulness, and reasonable skill and prudence. And the extent of such care and skill will be the same as that of ordinary bailees for hire, that which prudent men exercise in the conduct of their own affairs.¹

2. Hence the personal representative is not, in the absence of all want of due care and watchfulness, to be held responsible for the loss of money belonging to the estate which is deposited in a bank of good repute, in the official name of such representative.²

¹ *Briggs v. Taylor*, 28 Vt. 180, 183-187, where we have cited the authorities to some extent. *Best*, Ch. J., in *Batson v. Donovan*, 4 B. & Ald. 21, 32.

² *Swinfen v. Swinfen*, 29 Beav. 211. And it has been held, that the personal representative is not responsible where the goods of the estate are stolen without his fault. *Midgett v. Matson*, Admr., 44 Mo. 305. The rule of dili-

* 395 But * it is otherwise, where the moneys of the estate are mingled in the same account with the private funds of the executor or administrator.³

3. The matter is thus stated by Lord *Cottenham* :⁴ " It will be found to be the result of all the best authorities upon the subject, that although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will

gence and responsibility on the part of this class of trustees is the same as in other cases, that which prudent men exercise in the conduct of their own affairs. *Townshend v. Meagher*, 44 Mo. 356. There is one case in Tucker's N. Y. Sur. Rep. 71, where the general guardian of an infant enlisted his ward in the army, during the late civil war, and received \$327 in bounty money, \$100 of which he paid to the sergeant who procured the enlistment, and the remainder to the provost-marshal under a threat of being sent to Fort Lafayette unless he did. The court held the guardian responsible for the latter sum on the ground that being a case of " robbery " it was his duty to have prosecuted and reclaimed the money. This seems a very natural and sensible view of the case, in some respects, but rather severe upon the guardian, the robbery being clearly one resulting from the vis major, in the form of an armed mob, which if not absolutely the public enemy, is equally irresistible, and, it would seem, might excuse an ordinary bailee ; but we think there could be but one opinion in regard to its being a case of robbery, and ordinarily a trustee will not be responsible where the fund is stolen without his fault, or taken from him by strictly superior force, such as was wholly irresistible on his part. The personal representative who obtains the arrears of pension which the act of Congress provides shall be paid the administrator for the benefit of the children, if any, is not responsible for the same in settling his general administration account. He holds the same in trust for the children. *Perkins v. Perkins*, 46 N. H. 110. But it was here held, that the administrator was responsible upon his administration bond for the payment of the arrears of pension, so received by him, to the children entitled to recover the same, and decree passed accordingly. And where the personal representative deposits trust money in the bank to the credit of the trust or in conformity with the order of the court, he is not responsible for any depreciation of the currency. *Staples v. Staples*, 24 Gratt. 225. But if the trustee collected the money before the war, in gold or its equivalent, he cannot excuse himself now for not accounting for it in the same money or its equivalent, upon the ground that he suffered it to be changed into Confederate bonds during the civil war, that being then the only or ordinary mode of investment. He must now account for the money in the same medium in which he received it. *Crickard v. Crickard*, 25 Gratt. 410 ; *Williams v. Skinner*, 25 Gratt. 507.

³ 2 Story, Eq. Jur. § 1270 ; *Massey v. Banner*, 4 Mad. 413, 416, 417 ; *Freeman v. Fairlie*, 3 Mer. 29 ; *Clarke v. Tipping*, 9 Beav. 284.

⁴ *Clough v. Bond*, 3 My. & Cr. 490, 496. See ante, Vol. II., Payment and Abatement of Legacies, pl. 16.

not be responsible for the failure or depreciation of the funds, in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty is not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized; or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained; such personal representative will be liable to make it good; however unexpected the result, or however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."

4. "As if he omit to sell property when it ought to be sold, and it is afterwards lost without any fault of his, he is liable."⁵ So if * he allows money to remain upon personal security, * 396 which though safe at the time, ought to be collected, and the debtor afterwards fails.⁶ And the case is regarded as still stronger if the personal representative himself invest the money upon improper or inadequate security, or in an unauthorized fund.⁷ But if the trustee is robbed of the trust-money without his fault, he is not responsible, and he may, in ordinary cases, exonerate himself by his own oath, as he cannot commonly be expected to produce any other proof.⁸ Sometimes questions arise in regard to the personal representative having allowed parties with whom the deceased had contracted for permanent erections upon land, to

⁵ *Phillips v. Phillips*, Freeman's Ch. Ca. 11; *Grayburn v. Clarkson*, Law Rep. 3 Ch. App. 605.

⁶ *Powell v. Evans*, 5 Vesey, 839; *Tebbs v. Carpenter*, 1 Mad. 290. The questions how far an executor acted in good faith and with reasonable discretion in keeping the funds of the estate safely and productively invested, must be determined by the triers of the facts. *Smith v. Byers*, 41 Ga. 439; *Fitzsimmons v. Fitzsimmons*, 1 S. C. n. s. 400. But we apprehend the personal representative is never justified in suffering the debts, due the estate, or contracted for the purchase of property belonging to the estate, to remain on personal credit and security except at his own risk. *Roseman v. Pless*, 65 N. C. 374; *Leslie's Appeal*, 63 Penn. St. 355.

⁷ *Hancom v. Allen*, 2 Dick. 498; *Howe v. Earl of Dartmouth*, 7 Vesey, 137; *Baud v. Fardell*, 35 Eng. Law & Eq. 228; 2 Story, Eq. Jur. § 1269, and cases cited. When the trustee invested the trust money on inadequate security, through the fraud of the solicitor employed, he was held responsible for the deficiency. *Sutton v. Wilders*, L. R. 12 Eq. 373.

⁸ *Morley v. Morley*, 2 Ch. Cas. 2; *Knight v. Lord Plimouth*, 3 Atk. 480; *Jones v. Lewis*, 2 Ves. Sen. 240.

perform them. Thus in a recent case before the Master of the Rolls,⁹ the deceased had contracted for building a house upon his land, and died before the same was completed, and the personal representative allowed the contractor to complete it, and made the stipulated payments for the work, which had the effect to convert so much personalty into realty. The next of kin resisted the allowance of the disbursements in the administrator's account. But the court held the proceeding proper, and that the account was properly allowed. But where contracts are of a strictly personal nature, as with authors to prepare books for publication, or with artists to prepare paintings, or sculpture or works of that character, and the party dies, there is no duty of performance upon the part of the personal representative. The duty or obligation being strictly personal dies with the person. The same rule will apply to contracts to serve as an engineer upon a railway.¹⁰ And it has been applied to a contract to deliver all the lumber sawed at the obligor's mill, for five years, not to be less than a stipulated amount in all.¹¹

5. It seems, in general, that personal representatives, in common with other trustees, are not responsible for interest upon moneys in their hands, unless they have received it, or ought to * 397 have invested * the funds so as to have produced interest, or have been negligent in not applying it upon debts due from the estate, so as to stop the accumulation of interest.¹²

6. But it seems that in all cases where the personal representative has put the money to his own use, or let it remain idle, he shall be charged with the lawful rate of interest at the very lowest.¹³ And in the former case the courts of equity will

⁹ *Cooper v. Jarman*, 12 Jur. n. s. 956; s. c. L. R. 3 Eq. 98.

¹⁰ *Stubbs v. Holywell Railw.*, Law Rep. 2 Exch. 311.

¹¹ *Dickinson v. Calahan*, 19 Penn. St. 227.

¹² *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; 2 Story, Eq. Jur. § 1277, and cases cited.

¹³ *Manning v. Manning*, 1 Johns. Ch. 527. The rule is thus stated by *Bradwell, J.*, in *Eichhold v. Greenebaum*, 1 Chicago Legal News, 210; ante, Vol. II. § 31, pl. 16. *Primâ facie* an administrator or executor is not chargeable with interest for the first year; but if during that time he uses the money or receives interest for it, he must be charged with all he receives. *Primâ facie*, after one year, he is chargeable with interest, on all moneys in his hands, not necessary to pay debts or expenses. There is a somewhat remarkable case, *Turner v. Burkinshaw*, Law Rep. 2 Ch. App. 488, decided by Lord

generally * direct the accounts to be made up with annual * 398 rests, and sometimes at shorter intervals, so as to charge the trustee thus delinquent with compound interest.¹⁴

Chelmsford, Chancellor, in regard to the liability of an agent to account for money in his hands. The defendant had been the plaintiff's steward and most confidential agent for nearly twenty years, receiving and paying out all his moneys, and even drawing all his money from his bank account for the plaintiff's personal use during all the time. There were accounts rendered occasionally, but not regularly, for the first ten years; then no accounts for five years, when complaint being made he rendered accounts, annually, for the last four years. The plaintiff finally had the accounts examined by a solicitor, who discovered errors and omissions, when this bill was brought, and the balance found in the defendant's hands exceeded £4,000, upon which the plaintiff claimed to charge interest, for the balances due at the end of each year. The Lord Chancellor held, that, as there was no satisfactory evidence to charge the defendant with fraud, in purposely withholding the money, and there had been no demand for an account, interest could only be charged from the date of the Master's report. The decision must be regarded, in this country, as exceedingly unsatisfactory. It is clear that the defendant must either have intentionally withheld the money, or else that he was guilty of gross neglect, and in either case he should be charged with annual interest. So too, upon another ground, he either did, or might have received interest upon the money, while in his hands, and in either view, he is responsible for interest. And again, the plaintiff was entitled to have the money, due at the end of each year, and would have received it, but for the defendant's fault; and may be presumed either to have paid interest for the want of the money, or else it may be inferred that he would have placed the same at interest, if it had been paid when due. The responsibility of administrators in disposing of and converting the assets of the intestate is discussed in several recent cases in Alabama. *Perkins v. Lewis*, 41 Ala. 649; *Glenn v. Glenn*, id. 571; *Harris v. Parker*, id. 604; *Wright v. Wilkerson*, id. 267.

Some questions have arisen since the late civil war, both at the North and the South, in regard to the extent of the responsibility of executors, administrators, and other trustees for receiving payments, or investing the funds under their control in lawful tender notes, in the one section, and in Confederate securities in the other. It was held in *Jackson, Executor, v. Chase*, 98 Mass. 286, that such trustees were justified in treating the United States statutes making their notes legal tender as constitutional and valid, and could not be held responsible, as for a breach of trust, in so doing, for any loss or depreciation thereby occurring beyond what would have occurred, if they had re-

¹⁴ *Schieffelin v. Stewart*, 1 Johns. Ch. 620. It is here said the trustee is liable for simple interest if he negligently suffer the trust-money to lie idle, and that where the executor puts the money into his own business, or any unlawful adventure, he shall be presumed to have made profit to the amount

* 399 * 7. And it seems to be now regarded as settled, in the English courts of equity, that if the trustee himself put the

quired payments in coin upon debts created when that was the only currency, or had invested funds in their hands solely in coin. In what were the Confederate states there seems to be manifested a prevailing disposition to hold trustees harmless for accepting payments and making investments in the securities of that organization so long as it maintained its supremacy as the de facto national government. Cases above cited from Alabama, and *Dockery v. McDowell*, 40 Ala. 476 ; *Watson v. Stone*, id. 451 ; *De Jarnette v. De Jarnette*, 41 Ala. 708 ; *Trotter v. Trotter*, 40 Miss. 704. And we understand the very late decision of the United States Supreme Court to confirm that view, which seems, indeed, the only rational one. *Miller v. Gould*, 38 Ga. 465. But in one case it was held to be the duty of an executor to dispose of Confederate money, and invest in some safer security, and where it was held till it became worthless the executor was held responsible. *Wiley, Exr., v. Wiley*, 63 N. C. 182, citing *Same v. Same*, Phil. Law, 131. But see *Succession of Lagarde*, 20 La. Ann. 148. And if the trustee in his account charges himself with a certain amount in dollars, it has been sometimes said he cannot be allowed afterwards to show that it was in Confederate money, and thus reduce the extent of his responsibility. *Adams v. Westbrook*, 41 Miss. 385 ; *McFarlane v. Randle*, id. 411. But we understand the United States Supreme Court, in the case just alluded to, to have held the contrary, in regard to a written contract expressed in dollars, within the limits of the Confederacy during its existence. An administrator who needlessly retains money in his hands is chargeable with interest, and with the amount of debts which he fails to collect through his own fault and interest on the same. *Banks v. Machen*, 40 Miss. 256. If an executor have a large balance in his hands during the pendency of an appeal upon his final account, he should invest the same or ask the direction of the court, and if he omit to do either will be chargeable with interest. *Bruner's Appeal*, 57 Penn. St. 46. Executors, &c., are only liable for what they receive, unless lost by negligence, and will always be protected for acting under professional advice. *Neff's Appeal*, 57

of the lawful rate of interest at the lowest, and if he claims the contrary, it is incumbent upon him to show it. *Rocke v. Hart*, 11 Vesey, 58. The cestuis que trustent have an option whether to take the lawful interest or the profits. *Burden v. Burden*, cited, 1 Jac. & W. 134. But it is held in *Heathcote v. Hulme*, 1 Jac. & W. 122, that in such cases the cestuis que trustent must elect to take the lawful interest for the whole term or the profits for the whole term, unless such peculiar circumstances should arise as might entitle them to take profits for one part of the period and interest for another. And it has been held that where the executor mingles the moneys of the estate with his own, and deposits them in one common account with his banker in his own name, thus increasing his balances, and thereby gaining an additional credit, he will be regarded as having employed the money for his own benefit, and must

trust money * into his own business, by which he realized a * 400 profit beyond the rate of interest which would accrue from an

Penn. St. 91. In a recent case, *Cook v. Addison*, Law Rep. 7 Eq. 466; s. c. 17 W. R. 480, it was held that where the trustee mixes the trust funds with his own, he is liable for the entire trust property so mixed to make good any increase of interest.

In a recent case in the New York Court of Appeals, *King v. Talbot*, 40 N. Y. 76, the question of the duty of trustees in regard to the investment of trust moneys is carefully discussed by Justice *Woodruff*, and the following propositions adopted in the opinion of the court:—

1. It is their duty to place them where they will be safe and productive of income, and liable to recall at any time when needed for the cestuis que trustent, or the purposes of the trust.

2. The principal cannot be invested in the shares of joint-stock companies, where it could not be recalled without a resale of the shares; and where it would be subject to the risks and contingencies of the enterprise.

3. Where the executors were required to apply the interest of certain legacies, where the legatees were infants, to their maintenance and education during minority, and the principal, with any accumulation of income, to be paid them upon coming of age, and they invested the amount in canal, railway, and bank stock, making advances for the education and support of the legatees, from time to time, as needed, it was held that the legatees, upon coming of age, were not obliged to accept of the above investments, but might hold the executors responsible for the whole amount of their legacies and interest.

4. The executors were held responsible for six per cent interest from the death of the testator, computed with annual rests upon the amount of the legacies, deducting such taxes as they were obliged to pay.

5. A majority of the judges held, that in such cases trustees were bound to invest in government or real estate securities.

account for lawful interest upon the same. *Treves v. Townshend*, 1 Br. C. C. 384; *Rocke v. Hart*, supra; *Sutton v. Sharp*, 1 Russ. C. C. 146, 151, 152; *Westover v. Chapman*, 1 Coll. C. C. 177. See also *Hood's Estate*, Tucker, Sur. Rep. 396; *Prescott's Estate*, id. 430.

In two comparatively recent cases before Sir J. Romilly, M. R. (*Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, id. 461), the English authorities are reviewed, and the rule declared as the result, that if the executor retains balances in his hands which he ought to have invested, the court will charge him with simple interest at the rate of £4 per cent upon the same; but if in addition to this he has been guilty of a direct breach of trust in misapplying them, to uses not permissible, he shall be charged with the highest rate of lawful interest. See also *Crump v. Gerock*, 40 Miss. 766. The English cases are very numerous upon the subject of interest as against trustees, and to what extent compound interest may be computed, and sometimes whether a

* 401 investment in government * securities, the only strictly allowable investments for trust funds in that country, that

direction to make annual rests in computing the account really amounts to a direction to cast compound interest. In *Heighington v. Grant*, 5 My. & Cr. 258, Lord *Langdale* did not regard the direction as authorizing the casting of interest upon interest, from year to year. But when the case came before Lord Chancellor *Cottenham*, he held that the direction did imply the casting of compound interest in the ordinary mode. But Lord *Cranworth*, Chancellor, in *Attorney-General v. Alford*, 4 DeG., M. & G. 843, 851, 852, said he could not understand the principle upon which the court can proceed in *pœnam* to punish the executor for his misconduct, by making him account for more interest than he had received. And the conclusion here arrived at by the learned judge is, where the executor has money in his hands which he ought to invest and does not, to charge him only with the interest which he has received, or which the court is entitled to say he ought to have received, and which it is thus fair to say he did receive, and that he is estopped from saying he did not receive. And his lordship here contends that the misconduct of the executor has nothing to do with the amount of interest with which he shall be charged, unless it be misconduct affecting the amount of interest actually received. And the court here adopts the general rule before stated as to the amount of interest for which the executor is liable, i. e., £4 per cent for not investing money, and £5 per cent where he had improperly used the money. It was said in one case, that ordinarily the executor or administrator is not chargeable with interest upon money in his hands during the first year, unless he has mixed it with his own funds or otherwise used it to his own advantage. But where a portion of the fund so mixed with his own had been used by him, and he had unnecessarily refrained from distribution, he was charged with interest after six months from the death of the testator. *Ogilvie v. Ogilvie*, 1 Bradf. Sur. Rep. 356; *Hasler v. Hasler*, id. 248. See also *Cooch v. Irwin*, 7 Ohio, N. S. 22. In one case, *Chambers v. Kerns*, 6 Jones, Eq. 280, it is said the personal representative is not chargeable with interest, unless he receives it. We should add, or might and ought to have received it. The courts are so reluctant to visit the payment of compound interest upon trustees that they generally decline to do so unless in punishment for default of duty of so gross a character as to indicate want of good faith. *Smith v. Kennard*, 38 Ala. 695. Where money is retained by an executor, for any considerable time, it should, if possible, be put at interest, and especially where the claims, to meet which it is retained, are upon interest. *Monteith v. Baltimore Association*, 21 Md. 431. By the rule of the English courts, at an early day, executors, as such, were not allowed to derive any personal benefit from the funds in their hands, and were held accountable for the funds for the benefit of the *cestuis que trustent* at £5 per cent interest, with semi-annual rests. *Raphael v. Boehm*, 13 Vesey, 407. The American courts have held executors, who neglect to invest money of the estate in their hands, at the proper time, chargeable with simple interest, at the rate fixed by law, from the date at which it might and should have been invested. *Light's Appeal*, 24 Penn. St.

the cestui que trust is entitled to such profit. Thus where the executor of a deceased partner continued the business with the other partners, using the trust funds, it was held that he was accountable personally, and bound to pay over to those entitled to the estate all the profits made in the trade, and that the other partners were not necessary parties to the account; ¹⁵ thus virtually overruling the case of *Simpson v. Chapman*.¹⁶

8. And if the trustee loan the money to third parties, who knew of the breach of trust thus committed, the cestuis que trustent may follow the money into their hands, and compel them to refund the same with legal interest. But it is said, that in such cases the compensation for the use of the money will be limited to that stipulated by the borrowers, provided that is not less than the trustee should have realized by a proper investment.¹⁷

9. But, as before said, no trustee will in general be held responsible * for interest upon the trust fund, unless he has * 402 actually received it; or what is regarded much the same thing, might have received it, without incurring any hazard in regard to the investment. And where the personal representative paid away the moneys belonging to the estate, under a bonâ fide mistake as to the legal rights of the parties, the court did not charge him with interest upon the amount ordered to be restored.¹⁸ But where the administrator had, without reason, sold stock specifi-

180; *Biles's Appeal*, id. 335. Executors are held accountable for interest on the balance of the last account against them, in the probate court. *Brinton's Estate*, 10 Penn. St. 408. If the trustee loan the money to himself at a lower rate of interest than others pay, he will be held accountable for the ordinary rate. *Forbes v. Ross*, 2 Cox, 113. The personal representative, who omits to pay the debts of the estate, at the time required by law, if he have funds for that purpose, may be charged with the interest subsequently accruing. *Forward v. Forward*, 6 Allen, 494.

¹⁵ *M'Donald v. Richardson*, 5 Jur. N. s. 9; s. c. 1 Giff. 81. See also *Palmer v. Mitchell*, 2 My. & K. 672, and note. See *Stroud v. Gwyer*, 6 Jur. N. s. 719; s. p. *Billingslea v. Glenn*, 45 Ala. 540; *Matter of Holbert*, 39 Cal. 597; *Johnson v. Hedrick*, 33 Ind. 129; *Parker's Est.*, 64 Penn. St. 307.

¹⁶ 4 DeG., M. & G. 154. See also *Wedderburn v. Wedderburn*, 22 Beav. 84; s. c. 2 Keen, 722; s. c. 4 My. & Cr. 41; s. c. 2 Beav. 208; s. c. 17 Beav. 158; s. c. 18 id. 465.

¹⁷ *Stroud v. Gwyer*, 6 Jur. N. s. 719; s. c. 28 Beav. 130. See also *Dimes v. Scott*, 4 Russ. 195, here commented upon.

¹⁸ *Saltmarsh v. Barrett*, 8 Jur. N. s. 737; s. c. 31 Beav. 349; *Bruere v. Pemberton*, 12 Vesey, 386.

cally bequeathed to an infant, and retained the product, after an order for payment, he was charged with compound interest.¹⁹

10. And where the executor carries on the trade of the testator, by provisions contained in the articles of copartnership, or by the directions of the will, or in pursuance of the decree of the Court of Chancery, he is accountable for any profits realized; but not for any loss, in such cases, since he is acting according to his duty as trustee.²⁰ But it has often been held, that where the trustee adventures the trust funds in business of his own, or others, from which he expects to derive a benefit beyond the legal rate of interest, if he fail to receive any return, or even where the principal itself is lost, wholly or in part, he must make the fund good, with lawful interest at the least, although if more than legal interest had been received, he must also have accounted for all that was received, either as interest or profit; thus making the trustee responsible for all losses, and at the same time accountable for all gains, upon the ground that he is a volunteer, and shall therefore be held responsible to the utmost extent, in order to discourage such breaches of trust.²¹

11. So the personal representative cannot purchase the property of the estate for his own advantage, and will still be a trustee, after the purchase the same as before, and responsible to account for all that he gains in the resale.²² And if he compounds debts against

the estate for less than the claims, all profit thus made * 403 belongs to * the estate.²³ And the executor is not allowed to make profit to himself or the estate, by purchasing in the legacies at sums less than the amount due, but may be compelled to pay the amount due even after taking a full release from the legatee for a less sum, provided the assets are adequate.²⁴

¹⁹ *Walrond v. Walrond*, 29 Beav. 586.

²⁰ *Palmer v. Mitchell*, 2 My. & K. 672; *Willett v. Blanford*, 1 Hare, 253; 2 Wms. Exrs. 1668, and note.

²¹ *Piety v. Stace*, 4 Vesey, 620; 2 Wms. Exrs. 1670, and cases cited.

²² *Hall v. Hallet*, 1 Cox, 134; *Watson v. Toone*, Mad. & Geld. 153.

²³ *Ex parte James*, 8 Vesey, 337; *Anon.*, 1 Salk. 155; *Fosbrooke v. Balguy*, 1 My. & K. 226.

²⁴ *Barton v. Hassard*, 3 Dru. & War. 461. The same rules prevail in the American courts in regard to the right of a trustee to deal with the trust property for his own advantage. In *Green, Admr., v. Sargeant*, 23 Vt. 466, it was held the personal representative could not become the purchaser of the property of the estate, even when he pays a full price. He may be charged as trustee

12. The American law in regard to charging executors and administrators with interest, will, in the main, be found to conform to what we have already said in regard to the English law upon the subject. The rule in New York is well stated by *Walworth*, Chancellor,²⁵ as to trustees appointed by the Court of Chancery; and the same rule will apply to executors and administrators. It is here said it is the duty of such trustee to keep the trust fund entirely separate from his own moneys; and if deposited in a bank it should be in a separate account in the name of the trustee. If he loan any part of the money to his friends, temporarily, it is a breach of trust. So, too, if he mingle them with his own money, and he is in all such cases to be charged with simple interest, although he may not have received that amount. But if the trustee employ the trust fund in trade, or in any other mode, whereby he makes more than simple interest, he will be charged with the whole profits, either by way of compound interest, or in any other mode which in the opinion of the court will best carry out the principle of giving the cestui que trust the benefit of all profits made. The court allow simple interest only in cases where it is obvious the trustee could not have received more. But where the amount received by the trustee is doubtful, as to whether it exceed simple interest, and where it clearly does exceed, the cestui que *trust is allowed his election between simple interest * 404 and the actual profits, to be ascertained by reference. In stating accounts, periodical rests and compound interest are merely convenient expedients adopted by the courts of equity to charge the trustee with the amount of profits supposed to have been received by him upon the trust funds, where the actual amount beyond simple interest cannot be ascertained. This seems to us the fullest and fairest statement of the rule, as received and applied in this country, which we have been able to find. It is generally acted upon in that state where the cases involving the question are more numerous and important than in any other in America.²⁶

in equity even where the probate court have passed his account in which he charges himself with the price of the property, as sold by him. The same principle is maintained in *Mead v. Byington*, 10 Vt. 116. And it was held in *Petrie v. Clark*, 11 S. & R. 377, that equity will follow the assets of the estate into the hands of any one who is not a purchaser for valuable consideration, or who may be such, if guilty of fraud and collusion with the executor.

²⁵ *Utica Insurance Co. v. Lynch*, 11 Paige, 520.

²⁶ *Spear v. Tinkham*, 2 Barb. Ch. 211; *DePeyster v. Clarkson*, 2 Wend. 77.

13. But it is held in that state that a reasonable time must be given the personal representative to pay over the money, or invest the same, before interest will be allowed against him, and the term of one year seems there to have been regarded as proper under ordinary circumstances.²⁷ But if he have received interest, or mingled the money with his own, or if he used the fund, or needlessly refrained from distribution, he will be charged with interest after six months.²⁷ But the omission to invest money by an administrator, where he is liable at any moment to pay it out, is no ground for subjecting him to the payment of interest.²⁸ And where the administrator might have settled his account and closed the settlement of the estate at the end of eighteen months, but delayed it for six years, he was held chargeable with interest from the expiration of the former period.²⁹

14. It seems to be considered in New York that where the personal representative advances his own money for the benefit of the estate, as for the payment of taxes, necessary expenses, and repairs, and in the payment of debts which carry interest, that he is entitled to interest upon such advances.³⁰ And this seems to us

an entirely reasonable rule; but the contrary seems to have
 * 405 been * held in an early case³¹ in Massachusetts, upon the ground that it was always in the power of an administrator to put himself in cash from the estate, and that it was no part of his legal duty to advance his own funds for the benefit of the estate; to which, as an unexceptionable general rule, there will be

And it will make no difference, if the trustee use the trust funds, or deposit them in bank, or in any other mode mingle them with his own funds, that he was always ready to pay those entitled to the money; he will still be chargeable with interest. *Duffy v. Duncan*, 32 Barb. 587. But it has been held, that even where the trustee deposits trust money in bank, in his own name, and with other moneys of his own, and even where it is not the identical money collected on the trust, the *cestui que trust* may nevertheless demand and collect the money. *Van Alen v. Am. Nat. Bank*, 52 N. Y. 1.

²⁷ *Ogilvie v. Ogilvie*, 1 Bradf. Sur. Rep. 356.

²⁸ *Jacot v. Emmett*, 11 Paige, 142; *Burtis v. Dodge*, 1 Barb. Ch. 77.

²⁹ *Hasler v. Hasler*, 1 Bradf. Sur. Rep. 248.

³⁰ *Mann v. Lawrence*, 3 Bradf. Sur. Rep. 424. And the same rule obtains in the English courts. *Finch v. Prescott*, L. R. 17 Eq. 554. See also cases here referred to by counsel. *Ex parte Chippendale*, 4 DeG., M. & G. 19, 43, 54; *Murray's Executor's Case*, 5 id. 746, 753; *Sargood's Claim*, L. R. 15 Eq. 43.

³¹ *Storer v. Storer*, 9 Mass. 37.

found, as in all cases, many embarrassing exceptions, to which the rule of allowing interest upon necessary advances will apply, as was held in the same state, where the executor, not having assets, advanced his own money in order to redeem land belonging to the estate from a mortgage for less than its value, and to prevent a foreclosure.⁸²

14 *a.* The personal representative who advances his own money in payment of the debts and liabilities of the estate will ordinarily stand in the place of the creditor, whose debts are thus paid, and will be entitled to repayment in the same order and out of the same fund as such creditor. Thus, if his advances were made to meet exigencies in which, as executor or administrator, he had no legal right to intervene, as in carrying on the business of the deceased, he can only charge the estate what such advances netted, deducting all expenses. But if he paid the expenses of last sickness and funeral, taxes, or other preferred claims, he will be entitled to full payment in the first instance, before any payments are made upon the general debts due from the estate. And, on the other hand, if he pays any of the general debts in full, when the assets ultimately fail to meet all the debts, he must suffer a like deduction, with other creditors, from his advances.

14 *b.* Questions have sometimes arisen in regard to the proper mode for the personal representative to adopt, in order to reimburse himself for any advances made by him.

1. He may retain out of the assets in his hands to the extent that the creditors, for whom he made his advances, would be entitled to demand payment; thus carrying interest on his advances, where the claims paid by him would have borne interest if not so paid.

2. If he fail to do this, and thus indemnify himself, before his decease or resignation, he, if alive, or his personal representative, in case of his decease, must cause his account to be settled in the probate court, and the balance, his due, to be stated; which the court will order the administrator *de bonis non* to pay, out of any assets in his hands, or thereafter coming to him, and which are applicable to such claims. But no action can be maintained by the

⁸² *Jennison v. Hapgood*, 10 Pick. 77; *s. p.* *Barrell v. Joy*, 16 Mass. 221; *Hayward v. Ellis*, 13 Pick. 272. The same rule obtains in Vermont, *Rix, Admr., v. The Heirs of Smith*, 8 Vt. 365; *Evarts v. Nason's Estate*, 11 Vt. 122.

personal representative himself, or by his personal representative, in case of his decease, for the recovery of such balance against the administrator de bonis non. (a) A final order against the administrator de bonis non must first be obtained, which, it would seem, can only be reached by pushing the administrator to his final account, and thus showing that he had in his hands assets applicable to the payment of such balance, or that he might have obtained a license to sell real estate for that purpose, and therefore should have done so, (b) and then he will become liable to an action upon his bond, which seems to be the only effective remedy for the recovery of a balance due the former personal representative. (c)

15. It seems to be held in Massachusetts, that there is no ground for charging an executor or administrator with interest, unless he has received it upon the funds under his control,³³ or has been guilty of some neglect in applying the money to stop the accumulation of interest against the estate,³³ or else has put the money to his own use.³³ But the rule is otherwise as to trustees of money kept for the sake of being so invested as to produce income. In such cases, "where a guardian neglects to put his ward's money at interest, he will himself be charged with interest, and, in case of gross delinquency, with compound interest."³⁴

16. As far as we know, substantially the same rule obtains in the other New England states. The question is somewhat discussed in an important case³⁵ in Vermont, where the solvent executor was held responsible for the devastavit of his insolvent coexecutor; and it was considered that he could not be charged with interest upon the fund until he had an opportunity to pay it out, in such a manner as to exonerate himself; and that the legatees having slept upon their claim for nearly twenty years, could not thereby subject the innocent coexecutor to the payment of interest until suit brought, or demand made.

17. The rule is very fairly stated by *Williams*, Ch. J., in * 406 *Slade's Administrators v. Slade's Heirs*.³⁶ "Executors

(a) *Munroe v. Holmes*, 9 Allen, 244.

(b) *Munroe v. Holmes*, 13 Allen, 109.

(c) *Hoar, J.*, in *Munroe v. Holmes*, 13 Allen, 113.

³³ *Stearns v. Brown*, 1 Pick. 530; *Lamb v. Lamb*, 11 id. 371; *Wyman v. Hubbard*, 13 Mass. 232.

³⁴ *Boynton v. Dyer*, 18 Pick. 1, 7; *Miller v. Congdon*, 14 Gray, 114, 118.

³⁵ *Sparhawk v. Buell*, Exr., 9 Vt. 42, 82; *Cavendish v. Fleming*, 3 Munf. 198.

³⁶ 10 Vt. 192, 195.

and administrators are trustees, and must be faithful in the execution of their trust, and so conduct as not to subject the estate to any unnecessary expense or charge. If the sums received by them are large, and cannot be immediately applied to extinguish claims against the estate, they should be deposited where they can be available and productive, if it can be done with safety, or without subjecting the trustees to hazard." But it was here said, that if the sums received were small, and for any reason could not be immediately applied, the trustee ought not to be subjected to the payment of interest for retaining them until he could fairly make the application.

18. The same rule substantially was held in Connecticut many years since.³⁷ The rule is thus laid down by *McLean*, J., in *Barney v. Saunders*.³⁸ "The fifth exception is that the trustees should have been charged by the auditor, with all gains, as with those arising from usurious loans, unknown friends, or otherwise. . . . It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the cestui que trust for all the profit he has made. If he uses the trust-money in speculations, dangerous though profitable, the risk will be his own, but the profit will inure to the cestui que trust. Such a rule, though rigid, is necessary to prevent malversation." This, we are glad to believe, is substantially the present rule of the courts in all the American states.³⁹

19. In regard to compensation for the expenses or services of executors and administrators, the English rule will be found not entirely in harmony with that which prevails in the American states. In England such trustees, in common with others, are allowed all necessary expenses, paid out in the conduct of their office, unless arising from their own default.⁴⁰ Thus he cannot be allowed the costs of an action which he ought never to have defended.⁴¹ But an executor or administrator cannot recover

³⁷ *Adams v. Spalding*, 12 Conn. 350.

³⁸ 16 How. (U. S.) 535, 543.

³⁹ Fish's note to 2 Wms. Exrs. pp. 1670-1672, where the cases are very learnedly reviewed; id. 1766.

⁴⁰ *Pannel v. Fenn*, Cro. Eliz. 347.

⁴¹ *Chambers v. Smith*, 2 Coll. C. C. 742; *Smith v. Chambers*, 2 Phill. C. C. 221.

* 407 any * compensation for his personal services,⁴² in discharge of his duties ; nor will it make any difference that he has benefited the estate to the neglect of his own concerns.⁴² Nor will any express stipulation to that effect enable the personal representative to demand compensation for his services in such cases.⁴³

20. And the same rule is applied in the English courts as to allowing commissions to executors and administrators for the collection of moneys belonging to the estate. None will be there allowed beyond the money paid out. This rule has been carried so far as to deny commissions to an agent of the testator, after his death, and where the agent had become the executor.⁴⁴ So an executor who is one of a banking firm cannot charge the ordinary banking commission against the estate.⁴⁵ But it will scarcely be requisite to pursue the discussion of the English law upon this point further, since it must be familiar to the profession, that by the English law all compensation to a trustee for any personal services rendered in the administration of the trust, are studiously excluded, upon the supposed ground of policy ; that if allowed compensation, it might thereby induce unsuitable men to seek such offices, and proper men needlessly to enhance the service in the administration of the trust.

21. But in the Colonies, both in the East and West Indies, it has been found requisite to allow compensation to trustees for

⁴² *Robinson v. Pett*, 3 P. Wms. 249 ; *Brocksopp v. Barnes*, 5 Mad. 90.

⁴³ *Gould v. Fleetwood*, 3 P. Wms. 251, n. (A.) ; *Ayliffe v. Murray*, 2 Atk. 58. And even an attorney or solicitor who is an executor and renders professional services to the estate, cannot recover compensation. *New v. Jones*, 2 Wms. Exrs. 1679, n. ; *Moore v. Frowd*, 3 My. & Cr. 45. And the same rule has been extended to a firm of solicitors, one of whom is a trustee, where services of a professional character are performed by the firm. No compensation can be charged against the trust estate beyond the amount of actual disbursements. *Collins v. Carey*, 2 Beav. 128. And it will make no difference that such professional services are rendered by the partner who is not a trustee. *Christophers v. White*, 10 Beav. 523. And the same rule upon this point is strictly enforced in the more recent cases. In *re Taylor*, 18 Beav. 165 ; *Lord Cranworth*, Chancellor, in *Broughton v. Broughton*, 5 DeG., M. & G. 160. But where the solicitor acts professionally for himself and his co-trustee, he has been allowed to charge the same as would have been paid out if he had not been made a party to the suit. *Cradock v. Piper*, 17 Sim. 41. But see *Lyon v. Baker*, 5 DeG. & Sm. 622 ; *Broughton v. Broughton*, *supra*.

⁴⁴ *Sheriff v. Axe*, 4 Russ. C. C. 33.

⁴⁵ *Heighington v. Grant*, 5 My. & Cr. 258, 262.

personal * services, in order to induce suitable persons to * 408 undertake the office, and in such cases, where the fund in any manner comes into the English courts for administration, the same allowances are made to the trustees as if the administration had been completed in the Colonies.⁴⁶ This alone goes far to show that such a rule as one of policy merely works unfavorably. We have long been convinced that the duties of trustees may be so stringently and rigidly enforced as to drive honorable and fair-minded men out of all such places, and thus compel the appointment of men of less sensitive and high-minded sentiments, which is a result very seriously to be deplored.

22. The American courts, feeling that such must be the result of a rigid enforcement of the rules of the English law, in regard to requiring the services of trustees to be rendered gratuitously in all cases, in a country especially where there are few men in middle life whose pecuniary independence will allow of their devoting any considerable portion of their time to the gratuitous discharge of such duties, have attempted to adapt the law more to the condition of affairs by which they are surrounded. We are not aware that executors and administrators, or other trustees to any great extent, have ever been required to perform their duties gratuitously in this country. And it would seem that most, if not all, of the British Colonies adopted a different policy, in this respect, from that which prevailed in England.

23. In an early case in New York,⁴⁷ Chancellor *Kent*, after allowing the trustee four dollars per diem for time and expenses as a reasonable indemnity, goes into an elaborate review of the English cases up to that time, in order to justify the disallowance of all commissions to trustees; and the same rule is adhered to in a later case.⁴⁸ But this rule was modified at an early day by statute,⁴⁹ by which it was provided that the Court of Chancery should fix a "reasonable allowance" for "the services of guardians, executors, or administrators, over and above their expenses," and that when "settled by the Chancellor," it should "be conformed to in all cases of the settlement of such accounts." This

⁴⁶ 2 Wms. Exrs. 1682-1685, and cases cited.

⁴⁷ *Green v. Winter*, 1 Johns. Ch. 26.

⁴⁸ *Manning v. Manning*, 1 Johns. Ch. 527.

⁴⁹ Statute N. Y., Apr. 15, 1817, sess. 40, ch. 251.

* 409 question was * passed upon in the Matter of Roberts,⁵⁰ and a commission of five per cent allowed on all sums received and paid out not exceeding one thousand dollars, half that amount upon all sums between that and five thousand dollars, and one per cent on all sums exceeding the latter amount.

24. The above rule has long obtained in the State of New York, and is there regarded as imperative upon the surrogate courts.⁵¹ We suppose the same rule practically obtains in many of the other states where no statutory provisions exist, both on account of its innate reasonableness and propriety, as well as the high authority of the court by which it was established. But in New England, especially in the country districts, where the estates are small in comparison with the time and labor requisite in their final settlement, we think it is more common to compensate executors and

⁵⁰ 3 Johns. Ch. 43. This rule has since been adhered to. *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Dakin v. Demming*, 6 id. 95. And it is reenacted, 2 Rev. Stat. 93, § 58; Amended Laws, 1849, 218, ch. 160, with the addition, "just and reasonable allowances to be made for actual and necessary expenses." Commissions are estimated upon the whole sum collected and disbursed by all the executors, and the division made among them upon some equitable principle, according to the business done by each. But one who acts in the capacity of executor and trustee in regard to the same money cannot receive commissions in both capacities. *Valentine v. Valentine*, 2 Barb. Ch. 430. But in the case of *Witherspoon ex parte*, 3 Rich. Eq. 13, the same person was allowed to charge commissions as executor and guardian, with reference to the same money. This might be just, if one commission was for collecting and the other for disbursing. Commissions in this state are from two and a half to ten per centum. *Briggs v. Holcombe*, 3 Rich. Eq. 15. Commissions are properly withheld from an administrator guilty of gross neglect. *Hall v. Wilson*, 14 Ala. 295. Such neglect will deprive an executor or administrator of all claim to compensation for services. But the mere omission to make annual returns is not sufficient for that. *Gould v. Hayes*, 19 Ala. 438. The appellate court will not vary the commissions fixed by the court below, unless the allowance were founded in mistake or is clearly excessive. *Walton v. Avery*, 2 Dev. & Bat. Ch. 405. Where a legacy is given to one named as executor as compensation for his services, and he never acted or qualified as executor, it has been held that sum falls into the residuum of the estate. *Chapeau's Estate*, Tucker's Sur. Rep. 410.

⁵¹ *Hosack v. Rogers*, 9 Paige, 461; *Halsey v. Van Amringe*, 6 id. 12; *Dakin v. Demming*, id. 95. There seems to have been a statute from an early day, in South Carolina, allowing ten per centum on all sums of interest collected and invested as capital, by executors and trustees, *Bobo v. Poole*, 13 Rich. 224; but this rule does not there extend to the mere collection of interest and payment to a legatee. *Ib.*

administrators by a per diem allowance. In Massachusetts, from * an early day, and without any statute regulating it, * 410 trustees have been held entitled to reasonable compensation.⁵² And it is there regarded as no objection to allowing commissions to a trustee for receiving and paying out money, that specific charges for services are also allowed in connection with the same duties, provided the whole allowance does not exceed a just compensation. The commissions are considered as compensation for the services not specifically charged.⁵³ The usual commission there allowed is the same as that in New York, — two and a half per cent for collecting, and the same for disbursing money; but no commission is allowable upon the fund in hand upon the trustee assuming his office.⁵⁴ And a somewhat similar rule prevailed in Vermont from an early day, without any statutory provision.⁵⁵ The allowance there made is composed of per diem compensation, where that is applicable, and commissions, where that seems more just and appropriate.⁵⁶ This question is somewhat discussed in Story's Equity Jurisprudence,⁵⁷ and there seems of late to be a tendency to escape from the English rule upon the subject, in the courts of equity there, by multiplying the exceptions, — the usual expedient for escaping a vicious precedent. We do not suppose it would be profitable here to multiply the reiteration of the same or similar rules for compensating executors and administrators in the different American states. They will be found carefully collected in Mr. Fish's note to Williams.⁵⁸

25. It is scarcely necessary to say, that the settlement of an executor's or administrator's account before the probate court,

⁵² *Longley v. Hall*, 11 Pick. 120, 124.

⁵³ *Rathbun v. Colton*, 15 Pick. 471. See *Eshleman's Appeal*, 74 Penn. St. 42. But the executor or administrator cannot charge a commission for the payment of a debt due him from the estate. *Brown v. Walker*, 38 Texas, 109. And by parity of reason he could not charge a commission for collecting a debt due from himself to the estate. So, when a mortgage debt is paid by the mortgagee bidding in the property in payment, no commission is due the administrator. *Watt v. Downs*, 36 Texas, 116. Joint executors share the compensation equally without regard to the service rendered by each. *White v. Bullock*, 4 Abb. App. Dec. 578.

⁵⁴ *Dixon v. Homer*, 2 Met. 420; *Ellis v. Ellis*, 12 Pick. 178, 183.

⁵⁵ *Hapgood v. Jennison*, 2 Vt. 294.

⁵⁶ *Evarts v. Nason's Estate*, 11 Vt. 122.

⁵⁷ § 1268, and note; § 1268 a.

⁵⁸ 2 Wms. Exrs. 1679-1681.

unappealed from, or where the decree is passed in the court of final resort, is conclusive upon every question expressly or impliedly adjudicated.⁵⁹ But such adjudications have only been held conclusive upon matters specifically passed upon in the * 411 decree. * Hence, if the question of interest in such an account was not specifically passed upon in the prior accounts, it may be adjusted at the final hearing, although the question affects items allowed in former accounts.⁶⁰ But where the particular question of the allowance of interest had been raised and adjudicated at the former hearing, it is thereby concluded.⁶⁰ The judge of probate has power to open an account, or any other proceeding before his court for the purpose of correcting an error, upon a petition for that purpose, or on the settlement of a new account.⁶¹ And it is not competent for the court of probate to decree the account of the personal representative passed upon by it, to be final, so as effectually to discharge him from any future liability to be called before the court, to correct errors in the former accounting, or to answer for matters not embraced in the former account. He should specify the particulars in regard to which he settles his account, and he will not thereafter be liable to be called to account for the same thing a second time, unless guilty of fraud in the former accounting, which must be charged and proved as the ground for again opening the matter.⁶²

⁵⁹ *Probate Court v. Merriam*, 8 Vt. 234; *Saxton v. Chamberlain*, 6 Pick. 422. But in *Robertson v. Wright*, 17 Gratt. 534, it is said that an administration account settled in a case to which the heirs and next of kin are not parties, and have no opportunity to be heard, is not even *prima facie* evidence against them. But the lapse of twenty years without calling the personal representative to account raises a presumption of payment. *Ragland v. Morton*, 41 Ala. 344.

⁶⁰ *Saxton v. Chamberlain*, 6 Pick. 422.

⁶¹ *Stetson v. Bass*, 9 Pick. 27; *Boynton v. Dyer*, 18 id. 1; *Adams v. Adams*, 21 Vt. 162. But this only extends to opening the settlement of former accounts in the settlement of the same estate. *Granger v. Bassett*, 98 Mass. 462. And it can only be done for fraud or mistake. *Stevenson v. Phillips*, 2 McCarter, 236. And where an account is opened to correct a mistake in particular items, that does not entitle the party to re-examine any other portion of the account. *Ib.*

⁶² *Field v. Hitchcock*, 14 Pick. 405; *Adams v. Adams*, 21 Vt. 162, where it is said such a decree on a former accounting may be opened to correct an error caused by fraud, accident, or mistake. *Probate Court v. Merriam*, 8 Vt. 234; *Rix v. Heirs of Smith*, 8 Vt. 365; s. c. 9 Vt. 240. In this latter case, it was

26. The matter is thus stated by us, in an early case⁶³ in Vermont: * the adjudications of probate courts upon executors' accounts are in the nature of proceedings in rem, and only conclude matters which are directly passed upon, and not those collaterally recited. The decree is conclusive for the purposes for which it was made, and no further. It is conclusive as to the amount in the hands of the executor for distribution, but not as to the fact of distribution. It will therefore conclude the residuary legatee as to the claims upon the funds prior to his own, — for that is one purpose of the accounting, — but it will not conclude those prior claimants, whether creditors or legatees, as to the fact of their claims being paid by the executor, even where he is allowed to credit himself with the amount, as so much money paid, that issue not being determined by the court.

27. There has been some controversy, or some doubt, in regard to the powers of the probate court to enforce their final decrees for pecuniary balances against their officers and appointees; by attachment or other special proceedings, as in case of contempt. In one case,⁶⁴ it was held that the probate court had power to compel its appointees, such as guardians of infants, to render an account of all moneys received by them, and that by parity of reason they should be regarded as possessing the power to enforce such decree by attachment against the person of the guardian, as for contempt.

28. But in another case,⁶⁵ it was considered that the peculiar remedy had been carried further in the former case than could fairly be justified upon principle, and must be regarded as affected, to some extent, by the peculiar circumstances under which the

said the court may correct errors in former accounts rendered before the court, after any lapse of time short of twenty years; but this should only be done where the errors are apparent, or conceded by the parties, or proved *beyond all doubt*. See also *Vreeland v. Vreeland*, 1 C. E. Green, 512.

⁶³ *Sparhawk v. Buell*, 9 Vt. 41. But these introductory and partial accountings which it is common for the personal representative to make *ex parte* before the judge of probate are not regarded as concluding the rights of any one. *Clark v. Cress*, 20 Iowa, 50. They are merely reckonings with one's self. And the decree of the probate court in an ancillary administration allowing the administrator more than the assets in that jurisdiction has been held not binding in another jurisdiction. *Ela v. Edwards*, 13 Allen, 48.

⁶⁴ *Seaman v. Duryea*, 10 Barb. 523; s. c. 11 N. Y. 324.

⁶⁵ *Bingham in re*, 32 Vt. 329.

question arose. In this last case it was declared, that the probate court has no authority, for the purpose of enforcing a final decree for the mere payment of money, to imprison the party against whom the decree has been made, and that an administrator so imprisoned is entitled to be discharged on habeas corpus.

29. It was further considered in the last case, that the probate court might enforce its interlocutory decrees by way of attachment, as for contempt, where that became necessary to bring its proceedings to final hearing and decree: and that such courts might in this mode enforce such final special decrees as required its appointees to deliver to others specific property or money in
 * 413 their possession, * as depositaries, or fiduciary holders.

But a decree against an administrator, who, having been discharged, has settled his account in the probate court, requiring him to pay over to his successor the balance of money found due from him to the estate, such money accruing from the sale of the personal, and the use of the real estate, is not such a specific decree as can be enforced in that mode, it being merely a decree for the payment of money secured by his bond, and which should properly be enforced by suit upon such bond.⁶⁶ And the above view is confirmed by a recent case in Pennsylvania, where it was held, that the probate court has power to enforce by process of attachment against a former executor a decree that he shall deliver to his successor all the unadministered goods of the testator remaining in his hands.⁶⁷

30. It seems to be admitted to be the imperative duty of the executor or administrator to retain in his hands sufficient assets to pay all debts and pecuniary legacies, and no one can fairly object to his being credited to that extent, in his final account.⁶⁸

31. The personal representative in the settlement of his final account, is not responsible for the nominal amount of choses in

⁶⁶ Ante, § 8, pl. 6, 7, 8, 9, 10, § 10, pl. 6.

⁶⁷ Tome's Appeal, 50 Penn. St. 285. But the remedy by attachment is carried to a somewhat greater extent in the State of New York, probably, but not, we apprehend, to cases where there was no wilful or intentional withholding of the funds of the estate in the hands of the personal representative. Case of Callahan's Guardian, Tucker's Sur. Rep. 62. But ordinarily courts of probate have no power to proceed against mere strangers who withhold the estate from the personal representative.

⁶⁸ Monteith v. Baltimore Association, 21 Md. 431. But see French v. Hayward, 16 Gray, 512.

action coming into his hands ; but only for what he might have collected by the use of proper diligence. The onus is upon him to show that he used diligence ; but the general onus is upon those who claim his delinquency to show the amount he might have collected by the use of due diligence.⁶⁹ The cases are numerous where it * has been held that an executor or * 414 administrator is not responsible for the loss of property, so long as he acts in good faith and with ordinary discretion. A case must be proved of clear neglect of duty, in order to charge him with the loss.⁷⁰

32. An administrator has no just claim to be allowed for moneys paid out for the support of the intestate's minor children,⁷¹ unless

⁶⁹ *Wilkinson v. Hunter*, 37 Ala. 268. But in the case of *Moore's Estate*, Tucker's Sur. Rep. 41, the administrator was held responsible for not collecting good debts against a non-resident. The Surrogate said, "An administrator is always bound to use such care and diligence as a good business man would exert in the management of his own property, in order to collect claims against the debtors of the estate, whether resident or non-resident." And where the executor or administrator sells the property of the estate upon credit, without judicial sanction, and the price fails to be paid, he should be held responsible for the price, unless a very clear case be made on his part, showing the loss to have been without his fault. *Vreeland v. Vreeland*, 1 C. E. Green, 512 ; *Springer's Estate*, 51 Penn. St. 342.

⁷⁰ *Williams v. Maitland*, 1 Ired. Ch. 92 ; *Whitted v. Webb*, 2 Dev. & Bat. Ch. 442 ; *Doud v. Sanders*, 1 Harp. Ch. 277 ; *Webb v. Bellingher*, 2 Desaus. 482 ; *Thomas v. White*, 3 Litt. 177.

⁷¹ *Latta v. Russ*, 8 Jones, Law, 111 ; *Scott v. Dorsey*, 1 Har. & J. 227. It is here said the account settled by the personal representative in the Orphans' Court is not conclusive in regard to compensation allowed him ; but if improper may be revised. But that must be upon petition and for cause shown, we apprehend, and rests upon the ground that the allowance was fraudulent, which is good ground for revising all judgments. So mistakes in a partial account may be corrected in the final account. *Liddel v. McVickar*, 6 Halst. 44. It was held that the decree of the judge of probate allowing a trustee's account, after notice by publication, if not appealed from, is conclusive, in the absence of fraud, as to the amount with which he is chargeable. *Abbott v. Bradstreet*, 3 Allen, 587. Administratrix held responsible for money received on account of the estate more than twenty years after the settlement of her account and the distribution of the estate. *White v. Swain*, 3 Pick. 365. In *Donaldson v. Raborg*, 28 Md. 34, the court seem to have adopted very latitudinarian views on this subject. D., as administrator de bonis non of R., passed his second account on the twenty-fifth of April, 1837, showing a balance due the estate of his intestate of \$4,228.75 ; he passed no further account, and in 1865 died. After his death, letters of administration de bonis non of

* 415 * where, as in some of the states, there is a statutory provision to that extent.⁷²

the estate of R. were granted to C., who filed his petition in the Orphans' Court of the city of Baltimore against D.'s executors, alleging that their testator stood charged with this debt to the estate of the intestate R. down to the date of his death, and praying that they be ordered to pay it over to her with interest. To this petition the executors, protesting that their testator had fully administered the estate of R., and had paid the distributees their shares, and reserving the right to prove these payments if their pleas should be insufficient, pleaded three special pleas, one of which relied on limitations and lapse of time. The Orphans' Court, after argument, ordered the executors to pay the balance of \$4,228.75 over to C., without interest. Both parties appealed, the executors relying on their special pleas, and C. insisting that the order should have embraced interest on the balance from the date of the last account. On the appeal the order was affirmed. C. then filed another petition in the Orphans' Court, praying that the executors might be ordered to file an account of the assets received and the payments made by their testator, and in such account to charge themselves with interest, to be calculated in such manner as the court should think just and right. To this petition the executors filed an answer, tendering an account and insisting that their testator had fully administered the estate, and had paid away in due course of administration this whole balance to the parties entitled to receive it. To this, testimony was taken on both sides, and after argument by counsel, the court passed an order rejecting the account offered by the executors, and requiring them to furnish another, charging themselves with the full balance of \$4,228.75, and with simple interest thereon from the twenty-fifth of April, 1837. From this order both parties appealed.

Held, 1. That whatever effect the affirmance of the prior order of the Orphans' Court might have had to preclude the executors from setting up, *on their motion*, by further proceedings, the defence of *res judicata*, as to the principal appearing to be due by the said account, they are, by the petition of the administratrix, entitled, while showing the assets received, to show also the payments and disbursements made by their testator.

2. An administrator who passes an account showing a balance due the estate of his intestate is not thereby precluded from claiming an allowance in a subsequent account for the entire amount paid to distributees previously to the passage of the first account.

3. The duty is cast upon the administrator, in the first instance, after the payment of debts and charges, to ascertain who the distributees and persons entitled to the balance are; and if he pays to the right parties their proper shares he is protected, whether it be done under the sanction of the Orphans' Court or not, and it makes no difference whether such payments be made before or after the passing of an account showing the balance for final distribution.

In *Brown v. Brown*, 53 Barb. 217, it is decided that the final account of an

⁷² Gen. Stat. Vt. ch. 51, § 1, pl. 2, 3.

33. As a general rule the personal representative will not be allowed to charge for money paid counsel,⁷³ unless reasonably necessary for the protection of the interests of the estate.

But the * expense of auctioneers and clerks in disposing * 416 of the property belonging to the estate is properly chargeable.⁷³

34. The husband is not allowed, as administrator of his wife's estate before the discovery of her last will, and while it was supposed none existed, subsequently and after the will is established, to charge the estate with the expenses of opening the probate. But he may be allowed expenses bonâ fide incurred during his administration and before probate of the will, in procuring necessary administration in other states and prosecuting suits there for the recovery of debts in favor of the estate; and also the expenses

executor passed by the probate court, upon due notice to all parties interested, and full hearing, must be regarded as conclusive, both as to the assets coming to his hands and the disposition made of them, up to the time of the adjudication, unless impeached by showing fraud or mistake, in some future hearing before the same court. And when the executor continues to act thereafter, the former accounting forms the basis of all future accounts before the court. It would seem that the account rendered should show the disposition made of the money in the hands of the party bound to account, or else that he holds the money subject to the final order of the court; unless this does appear the parties interested in the money will be entitled to claim further discovery and accounting. *Frey v. Demarest*, 1 C. E. Green, 236; *Commonwealth v. Helgert*, 55 Penn. St. 236. And where one of the administrators has deceased, his personal representative should only unite in settling the joint account of the administration up to the time of the decease. *Stephens's Appeal*, 56 Penn. St. 409. There seems to be a strong disposition, in the best of courts sometimes, to open administration accounts, long since closed, whenever there is charged any injustice, with the hope of remedying it. But we fear that more is commonly thereby made than is cured. *Blake v. Pegram*, 109 Mass. 541. Errors apparent on the face of an account partially settled, may, no doubt, be corrected in the final accounting; but we venture to say that no court should open any judgment after the time for petition for new trial is passed.

⁷³ *Garrett v. Garrett*, 2 Strobb. Eq. 272. See also *Griffin v. Brady*, 18 W. R. 130; *Frith v. Campbell*, 53 Barb. 325; *Wood v. Goff*, 7 Bush, 59; *Moses v. Moses*, 50 Ga. 9. But liberal commissions and counsel fees ought not both to be allowed. *Trammel v. Philleo*, 33 Texas, 395. The personal representative is himself personally responsible for the services of attorneys rendered on the rendering of his final account. *Mygatt v. Wilcox*, 45 N. Y. 306; *Blake v. Pegram*, 109 Mass. 541. But see *Stephens's Appeal*, 56 Penn. St. 409.

incurred in preserving the property of the estate for which he has charged himself in his account.⁷⁴

35. An executor who is the surviving partner of the testator is entitled to charge the estate with the testator's share of debts paid by him, although barred by the statute of limitations. But the settlement of his account in the probate court, so far as the dealings between him and the testator, is not conclusive, but only to be regarded in the nature of admissions against himself or surviving partner.⁷⁵

36. As a general rule, under the statutes and practice of the different states, the account of an executor can only be settled in the probate court where he is appointed.⁷⁶ And the surviving partner of the decedent, who is also his administrator, may be called upon to account in the probate court, in regard to his settlement of the partnership.⁷⁷ The administrator de bonis non, it has been sometimes held, can only call the former administrator or executor to account for such estate of the decedent as remains in his hands,⁷⁸ and not for any portion of it which he has disposed of; but this seems questionable.

37. The personal representative is bound to charge himself, in his account, with any indebtedness on his part toward the estate,

⁷⁴ *Edwards v. Ela*, 5 Allen, 87. In *Collier v. Munn*, 41 N. Y. 143, it was held that an executor cannot receive from the estate any greater compensation than the statute commissions for his services, however meritorious or extraordinary they may be. It was accordingly held, by a divided court, that where one of the executors, being an attorney and counsellor, rendered important and valuable services at the request of his co-executors, in defending an action against the estate, which it was the duty of the executors to defend, that nothing could be allowed him out of the estate for such services.

⁷⁵ *Forward v. Forward*, 6 Allen, 494. The account of an executor, who is surviving partner of the deceased, before the probate court, is to be taken in the ordinary mode, and he will be bound to produce before the court the books and accounts of the firm. *Woodruff's Estate*, Tucker's Sur. Rep. 1. But at common law husband and wife cannot form a partnership in business. And where this is attempted the husband's estate will be liable for the wife's separate property which was received by him and put into the business, even where carried on between them under the statute, but originating before the passing of the statute. *Boyle's Estate*, Tucker's Sur. Rep. 4.

⁷⁶ *Brush v. Button*, 36 Conn. 292. See also *Bennett v. Overing*, 16 Gray, 267.

⁷⁷ *Leland v. Newton*, 102 Mass. 350.

⁷⁸ *Rives v. Patty*, 43 Miss. 388. The remedy is upon the bond after the probate court have closed the account. *Curtis v. Lynch*, 19 Ohio, n. s. 392.

although it be for the agreed price of real estate, purchased of the decedent, and which has not yet been conveyed, but which the heirs are ready to convey⁷⁹ on payment of the price. And he must account for his indebtedness to the estate at its full amount, without regard to his solvency.⁸⁰ And the same rule applies where the personal representative is a member of a firm which is indebted to the estate.⁸¹ How far the sureties of the personal representative may excuse themselves from responsibility for the full amount of the debt of their principal by showing his insolvency seems not entirely settled.⁸² But the better opinion would seem to be, that they may avail themselves of this defence.⁸³

38. The personal representative is entitled to a rebate in his final account for the amount of property inventoried by him and afterwards consumed in carrying on the business of the decedent at the request of all parties interested.⁸⁴

39. The personal representative having inventoried choses in action, and charged himself therewith in his primary and partial accountings, is not thereby precluded, in his final account, from taking credit for any loss on the same.⁸⁵

40. The recitation, in the final decree of the probate court upon the settlement of an administration account, that all interested in the estate had consented to the hearing, waiving notice and being of full age, or acting by duly appointed guardians, is sufficient evidence of notice to sustain the decree.⁸⁶

41. The settlement of the account of the personal representative in regard to the personalty, and the decree thereon made in another state, is not evidence against the devisees of the real estate, upon application for license to sell the same for the payment of debts, such devisees having no interest in and not being parties to the former accounting.⁸⁷

⁷⁹ *Chenery v. Davis*, 16 Gray, 89.

⁸⁰ *Guard v. Towle*, 54 N. H. 290 ; *Benchley v. Chapin*, 10 Cush. 176.

⁸¹ *Leland v. Felton*, 1 Allen, 535.

⁸² *Guard v. Towle*, supra.

⁸³ *Harker v. Irick*, 2 Stark. Ch. 269 ; *Piper's Estate*, 15 Penn. St. 533 ; *Gottsberger v. Smith*, 5 Duer, 566. See also *Kinney v. Ensign*, 18 Pick. 236.

⁸⁴ *Poole v. Munday*, 103 Mass. 174.

⁸⁵ *Leslie's Appeal*, 63 Penn. St. 355 ; *Sellew's Appeal*, 36 Conn. 186.

⁸⁶ *Pollock v. Buie*, 43 Miss. 140.

⁸⁷ *Bray v. Neill*, 21 N. J. Eq. 343.

42. In a recent English case,⁸⁸ where the executor employed the same solicitor, who had been long employed by the testatrix, and who was in good repute, to effect a compromise with certain creditors of the estate, and was informed by such solicitor that he had effected the compromise for £310, whereupon the executor gave him a check for that amount, and the solicitor misapplied the money, it was held the executor was not responsible for the loss, since it was indispensable for him to employ agents, and in this case he had been guilty of no want of care. But the case seems to us to have gone to the very verge of reasonable indulgence towards the executor, since there was no necessity that he should attempt any compromise with creditors, and, if he did volunteer to do so, he should be responsible for the faithful conduct of those he employed to assist him in a service not strictly within the necessary duties of his office.

43. It seems to be settled that the personal representative may retain the indebtedness of any of the distributees to the estate from his share of the estate, even where the debt is barred by the statute of limitations.⁸⁹

⁸⁸ *Oriental Com. Bank v. Savin*, L. R. 16 Eq. 203 ; ante, n. 7. .

⁸⁹ *White v. Cordwell*, 23 W. R. 826.

* CHAPTER XVI.

* 421

DISTRIBUTION OF PERSONAL ESTATE.

1. The final account will determine the estate to be distributed.
2. Duty of the personal representative to see that distribution is made.
3. Statute of distribution, and its construction, governed by civil law.
4. The mode of reckoning degrees of kindred governed by that law.
5. The order of distribution. First children and widow, and representatives of children.
6. A distributee or legatee, dying after testator or intestate, his share goes to his next of kin.
7. Half blood take equally with others. How representation allowed.
8. If no children the widow takes half; and if no widow children the whole.
9. The father takes the whole next after children. Next the mother and brothers and sisters equally.
10. It has been questioned whether grandparents take equally with brothers and sisters.
11. The extent of representation among collaterals and lineals.
12. Parties take per stirpes only when standing in unequal degrees; otherwise per capita.
13. The law of the American states, both as to descent and distribution, based on this statute.
14. Personalty distributed according to law of domicile, realty by *lex rei sitæ*.
15. The decisions of the courts of last resort, in place of domicile, fix succession to personalty.
16. And it cannot be distributed according to the law of the state where the property is, and where the distributees reside.
17. Whether one dies intestate, as to personalty, determined by law of place of domicile.
18. Questions of the legitimacy of distributees determined by same law.
19. All advancements made by the father to his children, reckoned against the share of such child.
20. An annuity or contingent interest may be an advancement.
21. An advancement to enable a son to form a partnership, sufficient.
22. Ordinary expenses, not advancements; but premium for apprenticeship is.
23. The law as to advancements does not apply, where there is a will.
24. Digest of some late English cases.
25. In Massachusetts advancements must have been so intended, &c.
26. Abstract of some of the cases in this state upon the point.
27. In Connecticut, whether advancement or no, depends upon intent of the father.
28. The law of advancements will apply to testate estates where the will so directs.
29. The making of entry in the father's books of money or property allowed to his children, proof of advancements.

- * 422 * 30. Nominal money consideration in deed repels the presumption of advancement.
31. The debts due from next of kin cannot be deducted from a distributive share.
 32. Cases in Alabama and Mississippi where the question of the distribution of estates is considered.
 33. Where the will gives the trustees power to advance income or capital, they may demand the direction of a court of equity.
 34. When parents allowed for maintenance of children.
 35. A court of equity will enforce a decree of the probate court in regard to the distribution of the estate.
 36. Where will defines advancements its terms must control.
 37. When trust funds applied to pay debts of cestui que trust.
 38. Courts of equity will not control discretion of trustees, but will enforce trusts for maintenance.

§ 48. 1. AFTER the debts are paid, in the case of intestate estates (and the same is true of personal estate undisposed of by will), the remaining personalty must be distributed to those entitled under the statute.¹ The amount of property for distribution will be determined by the final account of the personal representative before the probate court.²

2. It has been held that the personal representative is not bound to distribute, without a previous order, and that it is the duty of the probate court to make such order.³ This is the language of the English statute, but, in fact, it is equally the duty of the personal representative, and of the court, to see that the order is made in the due course of administration.⁴

3. The English statute of distributions, as we have before said, is borrowed mainly from the civil law,⁵ and the construction and practice under it have been governed more by the rules of the civil law than of the common law.

4. For instance, the degrees of kindred are reckoned according to the rule of the civil law, in regard to lineal kinship, by counting

¹ 22 & 23 Ch. 2, c. 10. This statute is the basis of most of the statutes of distribution of personalty in the American states, and equally of that governing the descent of real estate.

² Ante, § 48.

³ *Archbishop of Canterbury v. Tappen*, 8 B. & C. 151. In some of the states the probate court may order partial distribution, to those entitled, whenever it clearly appears that they are so entitled. *Reynolds v. The People*, 55 Ill. 328; *Anderson v. Gregg*, 44 Miss. 170.

⁴ 2 Kent, Comm. 420, 421.

⁵ 118 Novel of Justinian, 2 Kent, Comm. 422; *Carter v. Crawley*, T. Ray. 496, where there is a very learned reading upon the statute. Ante, § 7, pl. 8.

the degrees between the intestate and the claimant; and as to collaterals, by beginning at the claimant and counting the degrees to a common ancestor, and then downwards to the intestate.⁶

5. Under the statute those in equal degree are not equally entitled always. Thus, the children, who are in equal degree with the father and mother, are first entitled to all of the estate remaining after the payment of debts, and the assignment of one-third to the widow, if there be one.⁷ And if any child have deceased before * the intestate, leaving representatives, they will take * 423 the share of such deceased child.

6. And as we have before shown, if any one entitled to a distributive share in an estate, or to a legacy, shall de cease, after the de cease of the testator or intestate, and before the actual distribution of the estate, or the payment of the legacy, the same having vested in such distributee or legatee, will be disposed of the same as if it had been actually paid to such distributee or legatee, in his or her lifetime.⁸

7. The half-blood are equally entitled with the full-blood of equal degree.⁹ Representation, by the express terms of the statute, is not allowed beyond the degree of brother's and sister's children of the deceased intestate. Beyond that degree, all take per capita, and not per stirpes. And, consequently, the children of any deceased member of the generation, which is the next of kin to the intestate, are excluded from all participation in the distribution, until every member of that generation shall also have deceased. Consequently, if the intestate have no nearer of kin than uncles, which are in the third degree, they will take the whole estate, to the exclusion of the children of a deceased uncle or aunt, who are in the fourth degree. And nephews, who are in the third degree, will take the whole estate, to the exclusion of the children of a deceased nephew, who are also in the fourth degree.¹⁰

⁶ Ante, § 7, pl. 8 et seq.

⁷ 2 Kent, Comm. 421. And the New York statutes for the more effectual protection of the property of married women, do not, where the husband survives the wife, deprive him of the right of tenancy by curtesy to her real estate, and succession to her personal property as absolute owner, unless she disposes of the same during her life, or by will. *Burke v. Valentine*, 52 Barb. 412.

⁸ Ante, Vol. I. § 30 b, pl. 3, 4.

⁹ Ante, § 7, pl. 8 et seq.

¹⁰ *Pett v. Pett*, 1 Salk. 250; s. c. 1 Ld. Ray. 571; 1 P. Wms. 25; Com. 87; *Bowers v. Littlewood*, 1 P. Wms. 593.

8. If there be no children or their representatives, one moiety of the personal estate of the intestate goes to the widow, and the residue is to be equally distributed among the next of kin of equal degree. And if there be no widow, the whole will be distributed to the children in the first instance, or their personal representatives. And for want of any such to those nearest of kin, in equal degree, with the same limit in regard to representation already stated.¹¹

9. If there be no wife or children of the intestate, then * 424 the * father is first entitled to the whole personal estate.

And if there be no father living, the mother and the brothers and sisters, and their representatives, will be entitled to the whole personal estate, in equal shares. The mother will take the whole personal estate, next after the father, when there are no other next of kin, except those more remote than brothers and sisters and their representatives.

10. The grandfather or grandmother is in equal degree with the brothers and sisters, and, it would seem, should take concurrently with them; but this has been questioned both in England and among the civilians.¹² And it seems to be now settled that as between grandparents and brothers and sisters of the deceased the latter take the whole to the entire exclusion of the former.¹³

¹¹ 2 Kent, Comm. 422.

¹² Evelyn v. Evelyn, 3 Atk. 762; s. c. Amb. 191; 4 Burn's Eccl. Law, 416; 2 Kent, Comm. 424, and cases cited.

¹³ DISTRIBUTION OF INTESTATE ESTATES.

THE FOLLOWING TABLE, SHOWING THE MODE OF DISTRIBUTION OF INTESTATE ESTATES UNDER THE ENGLISH STATUTES OF DISTRIBUTIONS, WILL BE FOUND APPLICABLE IN MOST OF THE AMERICAN STATES.

<i>If intestate leave :</i>	<i>Representatives take :</i>
Widow and children, or child . . .	Widow, one-third ; the rest to the children or child ; if dead, to their representatives, or lineal descendants.
Widow	Half to widow, the rest to next of kin of the intestate, in equal proportions, or to their representatives ; if no next of kin, to the crown.
Widow, mother, brother, sister, &c. .	Half to widow, residue to mother, brother, &c.
Widow and mother	Half to widow, half to mother.
Widow and brother	Half to widow, half to brother.

* 11. As the statute only allows representation to the * 425 extent of brother's and sister's children, it has been decided in England, that the grandchildren of brothers or sisters of the intestate cannot take the share of such brother or sister by way of representation. Hence, if the intestate leave one brother living and two deceased, one leaving only grandchildren, and the other leaving children, the living brother and the children of the deceased brother will take the whole estate in equal moieties.¹⁴ But representation in the descending and ascending line is without limit.¹⁵

12. It seems to be settled that the distributees take per stirpes only when they stand in unequal degrees, but that they always

Widow, brother or sister, and mother	Half to widow, half to brother or sister, and mother.
No widow or child	All to next of kin or representatives.
Children or child	Children take equally, whether male or female, or all to only child.
Children by more than one wife . .	Children take equally.
Child and grandchild by deceased child	Half to child, half to grandchild.
No descendants	All to next of kin equally.
Grandchildren	Per capita.
Husband	Husband entitled to all effects.
Father and brothers and sisters . .	All to father.
Mother and brothers and sisters . .	All take equally.
Mother alone	Mother takes whole.
Uncle	All to him.
Maternal uncle	The whole to uncle.
Grandfather	All to grandfather.
Grandfather and brother	All to brother.
Grandmother	All to grandmother.
Brother and aunt	All to brother.
Brother and grandfather	All to brother.
Brothers' and sisters' nephews or nieces	Equally per stirpes.
Nephews of deceased brother and sister	To each equal shares per capita.
Brother and sister and children of deceased brother and sister . .	Half to brother or sister per capita, half to children of deceased brother or sister per stirpes.

¹⁴ *Pett v. Pett*, 1 Salk. 250 ; s. c. 1 P. Wms. 25. But in some of the states representation of brothers and sisters is allowed to the full extent. Gen. Stat. Vt. c. 56, § 1.

¹⁵ 2 Kent, Comm. 425.

take per capita, when they stand in equal degree, without reference to the number of the preceding generation which they represent.¹⁶

And where property of a deceased intestate is claimed by * 426 the next * of kin, those who set up a claim through one nearer of kin must show that such person survived the next of kin.¹⁷ It has been decided, in Massachusetts, that an antenuptial marriage settlement by which the wife bound herself not to claim any portion of her husband's estate, although enforceable in equity, will not, at law, afford any justification to the probate court to disregard her claim in distributing the estate.¹⁸

13. This subject as it affects the different states in America is very extensively discussed by the learned author of the *Commentaries*,¹⁹ and by the careful and learned editor of the American edition of *Williams's Executors*.²⁰ But it would not be compatible with our plan to pursue the subject to the same extent. The peculiar statutory provisions of the different states will best be learned by reference to those enactments. It seems to be admitted, on all hands, that the English statute of distributions forms the basis of the law equally of descents and distributions in most of the American states, except that in most of them the widow only takes a life interest in one-third of the real estate by way of dower. But in some of the states, where there are no children the widow takes the whole estate real and personal, if it do not exceed one thousand dollars, and when it does exceed that sum one-half the amount for ever, and the whole, in fee, when there are no kindred capable of taking it.²¹

14. We have had occasion before to state, incidentally, that

¹⁶ *Walsh v. Walsh*, Prec. in Ch. 54; *Davers v. Dewes*, 3 P. Wms. 40, 50. Thus, if the deceased leave children living, and also the representatives of deceased children, the representatives will take the share of the deceased child which they represent, without reference to their own number. But if all the children are deceased before the intestate, leaving only grandchildren, such grandchildren will take per capita an equal share, although one of them may be the only representative of a deceased child, and others to the number of ten or more may represent another child. 2 Wms. Exrs. 1349.

¹⁷ *Green's Settlement*, Law Rep. 1 Eq. 288.

¹⁸ *Sullings v. Richmond*, 5 Allen, 187; *Tarbell v. Tarbell*, id. 193, in note.

¹⁹ 2 Comm. 426-430.

²⁰ Vol. 2, p. 1335 et seq.

²¹ Vermont Gen. Stats. ch. 56, § 1. In New Jersey ancestors beyond the degree of father and mother cannot inherit real estate. *Taylor v. Bray*, 3 Vroom, 182.

where the intestate was, at the time of his decease, permanently domiciled in a foreign country, that his personal estate, after the payment of debts, will be distributed according to the law of the domicile at the time of decease. This is a point, in regard to which there is, at the present time, no controversy.²² But as to real estate the rule is otherwise, the descent being governed by the law of the place where the same is, by the *lex rei sitæ*,²³ as it is called.

* 15. We had occasion to discuss the recent cases bearing * 427 upon this topic in the late edition of Mr. Justice Story's *Conflict of Laws*, and we beg leave here to repeat what we there said.

It has lately been decided in the English Court of Probate and Matrimonial causes,²⁴ that the right of succession to personal estate, and who is the person entitled, must be determined by the law of the place of domicile of the intestate; and that the decisions of the courts of that place are decisive upon these questions. Thus, where one domiciled through life in Portugal, and who died without having ever been married, leaving one natural son, left personal estate in England, it was held that this son having

²² Story, *Confl. Laws*, §§ 481-482 a, 491 a, 514, 514 b.

²³ Story, *Confl. Laws*, §§ 483-484 a. Leaseholds, which are personally by the English law, have still been held subject to the law of the state where situated, notwithstanding the deviser may be domiciled in another state, where the law is different. See *Despard v. Churchill*, 53 N. Y. 192; *Frêke v. Lord Carbery*, L. R. 16 Eq. 461; ante, Vol. 1. 398, n. 5.

²⁴ *Crispin v. Doglioni*, 9 Jur. N. S. 653. 'In a recent case before the House of Lords, *Udny v. Udny*, Law Rep. 1 Sc. App. 441, the question of domicile is largely discussed by the Law Lords, and the former doctrine of the English courts as to the retention of national domicile while residing almost constantly abroad, somewhat qualified, or the deductions made from it more distinctly repudiated. It is here said that an unlimited intention of continued residence in a place implies a domicile in that place. In order to constitute domicile there must be a residence freely chosen, not dictated by any external necessity. Where one had resided twenty years in Jersey, his domicile of origin being in Scotland, and had caused the bodies of two of his children, who had died and been buried in France, to be disinterred and buried in Jersey, and contemplated being buried there himself, and executed a codicil to his will, shortly before his death, on the assumption that his domicile was in Jersey, it was held that these facts, especially the length of residence, established his domicile in Jersey, and that this inference could not be shaken by evidence of his affection for Scotland, or that his reasons for living in Jersey were that the place was cheap and the climate suited him.

instituted a suit in Portugal, and obtained a decree by the Supreme Court of Lisbon, by which he was declared entitled to the whole movable and immovable property of the deceased father; the English courts would regard that decision, being made upon full hearing of all the parties interested, as conclusive of the right of succession to such personal estate in England.

16. So where one deceased in Connecticut, domiciled there, leaving a will duly executed according to the law of that state, and where his principal property was; also left personal estate in New York which rendered it necessary to take administration there; and after the funds within the latter state had been collected, some of the legatees, who had come to reside in that state after the testator's death, claimed that such funds should be there distributed,

* 428 there * being a difference of opinion between the surrogate there and the courts in Connecticut, as to the construction of the will; it was held by the Court of Appeals in New York, that the surrogate should have remitted the funds in that state to the courts of Connecticut for distribution.²⁵

17. And in another case in the same court,²⁶ it was held, that whether a deceased person died intestate or not, must be determined by the law of the place where he was domiciled at the time of his death. That is the law which prescribes the requisites to the valid execution of a will of personal estate. Accordingly where a citizen of South Carolina executed his will in such a manner as to create a valid bequest of personal estate, by the law of that state, but not according to the law of New York, into which state he subsequently removed and died, having his domicile in the latter state at the time, it was held that he died intestate as to personal estate within that jurisdiction.

18. The language of an English will is held so completely subject to the construction of the English law, as before stated, that a bequest contained in such a will to the child of A., who resided and was domiciled in France, and had there a natural child which was, by the law of that country, rendered legitimate by the subsequent marriage of the parents, cannot be claimed by such child who is, according to the English law, still illegitimate and *filius nullius*.²⁷ So also, a bequest to the children of one who

²⁵ *Parsons v. Lyman*, 20 N. Y. 103. ²⁶ *Moultrie v. Hunt*, 23 N. Y. 394.

²⁷ *Boyes v. Bedale*, 12 Weekly Rep. 232, before Vice-Chancellor Wood; s. c. 1 H. & M. 798.

cohabited with a woman in England, and had children by her in England, and subsequently removed to Holland, where they continued to cohabit, and had children both before and after their marriage, which took place while they were domiciled in Holland, by which all the children became legitimate by the law of that country, will not carry any thing to the children born in England, whose illegitimacy is irretrievably fixed by the law of the place of birth.²⁸

19. If the father,²⁹ during his lifetime, on the occasion of the * marriage or settlement in life or otherwise, have * 429 made any advancement to any of his children, *towards their distributive share in his estate*, this must be reckoned in making the distribution. It seems requisite, according to the practice in America, that the advancement, in order to be reckoned toward the distributive share of the child, must have been so intended by the father, and so understood by the child, or at least the former must clearly appear. And such an advancement will affect the representatives of such child who come in after his decease and take his share.³⁰ In *Taylor v. Taylor*, (a) (1875), the Master of the Rolls, Sir *G. Jessell*, thus defines all advancement under the English statute, where the parent gives a particular sum of money to a child, for the purpose of setting up such child in a profession or business, or in a social position, as upon marriage. But voluntary payments made to the child, from time to time, to enable the

²⁸ *Goodman v. Goodman*, 3 Giff. 643. This case, to be strictly consistent with the preceding one, should have excluded all the children born before marriage. But it admitted all the children born in Holland. The legislature has power, either by general or special statute, to legitimize any one, whether born before or after the date of the statute. *McGunnigle v. McKee*, 32 Leg. Int. 127; *Brewer v. Blougher*, 14 Pet. 178.

²⁹ This rule applies only to the father, and not to the mother who died a widow, having made advancements to some of her children. *Holt v. Frederick*, 2 P. Wms. 356. But it applies to grandchildren who come in by representation to take the share of a child. *Bransford v. Crawford*, 51 Ga. 20.

³⁰ *Proud v. Turner*, 2 P. Wms. 560. The fact that a parent had disposed of a portion of his estate by will, cannot exempt the remainder from the operation of the law of advancements to his children in his lifetime, towards their distributive shares. In Ohio, one may advance a portion of the share of his daughter to her husband, if so intended by the father and acquiesced in by the daughter; although the father took no other evidence of the advancement except the receipt of the husband. *Dittoe v. Cluney*, 22 Ohio, n. s. 436.

* (a) 23 W. R. 719; L. R. 20 Eq. 155.

child to get on in the world, will not be so regarded, unless the distinct purpose above stated be shown to have existed in the mind of the parent.

20. An annuity provided by the father to take effect at the time of his death, is regarded as an advancement.³¹ So also if the provision be contingent, it shall be reckoned an advancement after it becomes absolute ;³¹ and it is here said, that while the provision is * contingent it may either be estimated at its probable value, or some limitation, in the distribution made, with a view to equalize the shares of the children when it shall become absolute.

21. Where the father advanced £10,000 to his son, to enable him to form a partnership, and took his promissory note for it payable on demand, and on his death-bed burned the note, and died intestate, it was held that although the burning of the note

³¹ *Edwards v. Freeman*, 2 P. Wms. 435, 440, 445, where the subject of advancements is considerably discussed. A premium paid on the son being articulated to an attorney was held to be an advancement although the profession was afterward relinquished. So the price of a commission in the army, and a sum paid for the son's gambling debts, indispensable to enable him to remain in the army, were held advancements. But £288, paid for horses and an outfit, it was doubted whether it could be so regarded. *Boyd v. Boyd*, Law Rep. 4 Eq. 305. An advancement has been defined as a gift from a parent to his child, in part or in whole, in anticipation of what it is supposed the child would be entitled to on the death of the parent. *House v. Woodard*, 5 Coldw. 196. A voluntary conveyance of land made by a parent to a child is *prima facie* an advancement and not a gift ; but this is purely a question of intention, and oral evidence may be received upon that point. *Woolery v. Woolery*, 29 Ind. 249 ; *Dutch's Appeal*, 57 Penn. St. 461. See also *Clearwater v. Kimler*, 43 Ill. 273. The validity of an advancement is not affected by lapse of time. *Hughes's Appeal*, 57 Penn. St. 179. In *Fellows v. Little*, 46 N. H. 27, it was decided that charges found on the books of account of a deceased parent of personal property delivered to his children, entered in such a manner as to exclude the presumption either of a debt or gift, were to be regarded as proper evidence of advancements made to such children. But the force of the evidence under the New Hampshire statute, Comp. Laws, c. 176, § 12, is to be determined from such entries alone, and no verbal evidence can be received, showing subsequent oral declarations of the deceased, controlling the evidence from the books. But in Kentucky, 1 Rev. Stat. 426, § 117, it is held that a father having made a parol gift to each of his two sons, of a tract of land, and thereafter dying intestate, his heirs cannot refuse to execute the gift, and charge the sons with the rents as advancements. *Montjoy v. Maginnis*, 2 Duvall, 186.

amounted to a release of the debt, it should nevertheless be reckoned as an advancement towards his share.³²

22. Small and inconsiderable sums for the current expenses, ornaments, and education of children are not to be regarded as advancements.³³ But a premium for apprenticeship for a trade or profession, it is said, may be so regarded when the sum is considerable.³³

23. And where there is a will, but some portion of the personalty is undisposed of, no advancement in the distribution of such undisposed residue will be reckoned, but the children will share equally.³⁴

24. There has always been great uncertainty as to what could fairly be reckoned an advancement by the decedent in his lifetime towards a legacy or portion or distributive share. We have considered these points to some extent, under their separate heads, but it will be convenient to state some of the recent cases here. A payment to the husband of a daughter of £1000, jocularly stated to be in exchange for his snuff-box, cannot be reckoned as an advancement to the daughter.³⁵ But where the father had advanced money to his son, and paid large sums on his account, and in his will gave him a legacy, it was held such loans and balance of account must be set off against the legacy.³⁶

25. In Massachusetts and some other of the American states from an early day, by express statute, nothing could be reckoned as an advancement to a child by the father, unless, in the language of *Parker*, Ch. J.,³⁷ "it be proved to have been intended"

³² *Gilbert v. Wetherell*, 2 Sim. & Stu. 254.

³³ 2 Wms. Exrs. 1355.

³⁴ *Sir William Grant*, in *Walton v. Walton*, 14 Ves. 318, 324. s. p. *Greene v. Speer*, 37 Ala. 532; *Linnell v. Linnell*, 21 N. J. Eq. 81.

³⁵ *M'Clure v. Evans*, 29 Beav. 422.

³⁶ *Smith v. Smith*, 3 Giff. 263. And where the will directed that any indebtedness of one child to brothers or sisters should be paid by the trustees out of the share of that child, and thus reckoned as an advancement towards the share of such child, it was held to embrace debts barred by the statute of limitations, but not the interest upon such debts. This last view was based upon the ground that the testator intended to place advances by the brothers and sisters upon the same ground as if made by himself; and, not having directed interest to be reckoned upon his own, he could not be presumed to have intended it to be reckoned on the others. *Poole v. Poole*, L. R. 7 Ch. App. 17. See also *Shotwell v. Struble*, 21 N. J. Eq. 31; *Puryear v. Cabell*, 24 Gratt. 260.

³⁷ *Osgood v. Breed's Heirs*, 17 Mass. 356, 358. It was here held that no

* 431 as such, * and "chargeable on the child's share of the estate, by certain evidence prescribed."

26. In this state an acknowledgment of the child, of having received the whole or a portion of his share, is sufficient.³⁸ But an account against a child in the usual mode of keeping accounts of debt will not be sufficient to establish an advancement. It must be charged as an advancement, under the statute in this state, or so acknowledged in writing by the child, or else so expressed in the gift or grant.³⁹ A deed expressed partly for the consideration of love and affection, and partly for a pecuniary consideration, is not to be deemed in any part an advancement, not coming within the requirements of the statute.⁴⁰ And where the son gave a note for money received of the father, it was held that it could not be shown by parol to have been intended as an advancement.⁴¹

27. Whether a conveyance of property by a father to his son without consideration is to be treated as a gift or an advancement, or partly one and partly the other, in Connecticut, depends upon the intent of the grantor.⁴² In some of the states money or

interest was chargeable on such advancements. An agreement in writing among the children, without the knowledge of the father, that sums owing by some of them to him shall be treated as advancements in the settlement of his estate will not make them such under the statute. *Fitts v. Morse*, 103 Mass. 164.

³⁸ *Quarles v. Quarles*, 4 Mass. 680 ; *Kenney v. Tucker*, 8 id. 143 ; *Bulkeley v. Noble*, 2 Pick. 337. But in this last case it was held that an advancement could not, under the statute, be proved by parol. Nor will a declaration of the intestate, that he had made charges as advancements to his children, be sufficient, even where his book is produced, with three leaves cut out. *Hartwell v. Rice*, 1 Gray, 587.

³⁹ Gen. Stat. Mass. ch. 91, § 8.

⁴⁰ *Bullard v. Bullard*, 5 Pick. 527 ; *Adams v. Adams*, 22 Vt. 50.

⁴¹ *Barton, Judge, v. Rice*, 22 Pick. 508.

⁴² *Meeker v. Meeker*, 16 Conn. 383. And this may be shown by oral evidence. *Thomas v. Coffs*, 5 Bush, 273. It has been recently decided in New York, *Parker v. McCluer*, 3 Keyes, 318, where an arrangement was made between father and son for the conveyance by the former to the latter of a certain lot of land in full of his share in his father's estate, and the land was surveyed, and the son took possession of and held the same until his death, and it was afterwards sold and the proceeds applied in payment of his debt, that this must be regarded as an advancement, and it appearing to be fully equal to his share it must be treated as a bar to all claim on the part of his heirs or next of kin.

other property given by a parent to a child or descendant, will be presumed to have been intended as an advancement, unless the presumption be repelled by circumstances showing it to have been intended as an absolute gift or in the nature of a gift.⁴³ So too where the father pays the debt of a child, the law, it is said in *one case, presumes it an advancement to the child, *432 unless it appear it was not so intended, but either as a debt against, or a gift to the child.⁴⁴ The law of advancements has no application to the widow of the decedent.⁴⁵

28. Although the law of advancements has no application to testate estates: still if the will bequeath the property to the children in equal shares and direct that such of them as have received property from the testator shall account for the same to the estate, this will require that the same rule shall be applied to the case as in regard to advancements in intestate estates.⁴⁶

29. In a late case⁴⁷ it was held that where the father made entries of the delivery of property and money to his children, in his books, so as to show they were not intended as gifts, or in the nature of debts, that they must be treated as advancements, and this character would not be changed by proof of subsequent declarations of the father showing a different purpose. And where gifts to minor children by a father are such as to assist them in starting, and to advance them in getting a living or education, there being nothing to show they were not made as advancements, they must be so considered.⁴⁷

30. By a provision in the early statute of distributions in Massachusetts, deeds of land in consideration of love and affection were presumptively treated as advancements. But if any consid-

⁴³ *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey*, id. 614. See also *Mavor's Appeal*, 63 Penn. St. 309; *Oller v. Bonebrake*, 55 Penn. St. 338; *Puryear v. Cabell*, 24 Gratt. 260.

⁴⁴ *Johnson v. Hoyle*, 3 Head, 56. In *Stock v. McAvoy*, L. R. 15 Eq. 55, Vice-Chancellor *Wickens*, a very reliable authority, said: "Where a father purchases property in the name of his son, without making any formal declaration of trust, it is either a gift to his son absolutely, or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is, that he is not a trustee at all; and it can only be displaced by evidence."

⁴⁵ *Barnes v. Allen*, 25 Ind. 222.

⁴⁶ *Manning v. Manning*, 13 Rich. 410.

⁴⁷ *Fellows v. Little*, 46 N. H. 27.

eration besides, however small, were expressed in the deed, that presumption was repelled and proof was admissible to show whether it was intended as an advancement.⁴⁸

31. In the division of intestate estates among the next of kin entitled, there will be no right to deduct a debt due the estate from the share of any of the next of kin, although insolvent.⁴⁹

32. The cases where the subject of the distribution of intestate estates is considered are very numerous in some of the states. Thus in Alabama and Mississippi, the subject is examined more or less in the following cases.⁵⁰

* 433 * 33. Where the will gives trustees the power to advance either capital or income for the maintenance of legatees, they may, under the English statute, take the advice of a court of equity, as to the particular emergency.⁵¹

34. The courts of equity do not allow parents to apply legacies, or the income accruing therefrom, to the support and education of their infant children, unless the parents are unable to afford such maintenance and education to their children as their condition in life demands; nor will the parent be allowed compensation for past maintenance, unless it is very clear that the circumstances of the parent very obviously require it.⁵²

35. A court of equity will enforce the distribution of an estate in pursuance of a decree of the probate court entered by the agreement of the parties interested.⁵³ And payments made by the per-

⁴⁸ *Scott v. Scott*, 1 Mass. 527.

⁴⁹ *Bell v. Bell*, 17 Sim. 127; *Procter v. Newhall*, 17 Mass. 93; *Hancock v. Hubbard*, 19 Pick. 167. *Merrick, J.*, in *Dearborn v. Preston*, 7 Allen, 192, 194, 195.

⁵⁰ *Satcher v. Satcher*, 41 Ala. 26; *Hoard v. Hoard*, id. 590; *Page v. Matthews*, id. 719; *Brown v. Brown*, id. 215; *Harris v. Parker*, id. 604; *Carter v. Owens*, id. 217; *Harrison v. Meadors*, id. 274; *Brazeale v. Brazeale*, 9 Ala. 491; *Allman v. Owen*, 31 Ala. 167; *Sowell v. Sowell*, 41 Ala. 359; *Cameron v. Cameron*, 29 Miss. 112; *Steadman v. Holman*, 33 id. 550; *Smith v. Williams*, 36 id. 545; *Hoover v. Wells*, 39 id. 445; *Stuhlmuller v. Ewing*, 39 id. 447; *Dease v. Cooper*, 40 id. 114; *Slaughter v. Garland*, 40 id. 172; *Mundy v. Calvert*, 40 id. 181; *Slaughter v. Garland*, 40 id. 172; *Evans v. Fisher*, 40 id. 644; *Byrd v. Wells*, 40 id. 712; *Allison v. Abrams*, 40 id. 747.

⁵¹ *In re Long's Settlement*, 17 W. R. 218.

⁵² *In re Kerrison's Trusts*, L. R. 12 Eq. 422; *Sparhawk v. Buell*, Adm., 9 Vt. 41; *McKnight v. Walsh*, 23 N. J. Eq. 136.

⁵³ *Pollock v. Learned*, 102 Mass. 49.

sonal representative, in conformity with the decree of distribution in the probate court, will be protected.⁵⁴

36. Where portions are provided for by the will, defining what shall be reckoned as advancements towards such portions, nothing can be reckoned as such, unless coming within the terms of the will.⁵⁵

37. Where a fund was put in trust for the successive benefit of one and his children, and a certain portion allowed to be expended for the preferment or advancement of the parent, in the discretion of the trustees, it was held that, the cestui que trust being thirty years of age and married, the trustees might apply some portion of the fund in paying his debts, which he was unable to pay, and which absorbed most of his income.⁵⁶

38. And where an absolute discretion, as to the amount to be expended by trustees in the maintenance of the cestui que trust, is reposed in the trustees, a court of equity will not control such discretion.⁵⁷ But all legacies in trust for the maintenance of cestuis que trust are subject to the construction and enforcement of a court of equity.⁵⁸

⁵⁴ *Kellogg v. Johnson*, 38 Conn. 269 ; *Bank v. Van Brunt*, 49 N. Y. 160.

⁵⁵ *Loring v. Blake*, 106 Mass. 592.

⁵⁶ *Lowther v. Bentinck*, L. R. 19 Eq. 166.

⁵⁷ *Gisborne v. Gisborne*, 23 W. R. 410.

⁵⁸ *Wainford v. Heyl*, 23 W. R. 849 ; L. R. 20 Eq. 321.

CHAPTER XVII.

APPORTIONMENT BETWEEN TENANT FOR LIFE AND REMAINDER-MAN.

1. Income goes to tenant for life, principal to remainder-man.
2. The corpus of the fund must be preserved entire.
3. But sometimes apportionment made before whole sum recovered.
4. Sum paid in compromise of claim, how apportioned.
5. Sometimes held additional shares out of income are capital.
6. This is at variance with the earlier cases.
7. Some of the late English cases take that view.
8. It seems to be at present the prevailing rule. Other points.
9. Assessments by way of betterments held to be capital. Expenses of maintaining estate, how paid.

§ 49. 1. WE have had occasion to refer to the subject of apportionment between the estate and annuitants or legatees.¹ And the same subject has to be considered in distributing a fund between the tenant for life and those entitled in remainder. What is strictly income, in whatever form it may accrue, will belong to the tenant for life; but, on the other hand, all that constitutes the principal, capital, or corpus of the fund must be preserved entire for the remainder-man.

2. Thus where the trustee squandered a fund in his hands, and after his decease the new trustees presented a claim against his estate, not only for the principal fund lost through the mismanagement of the former trustee, but also for the accruing interest, and recovered a sum less than the principal sum lost, it was held that nothing could go to the tenant for life of that recovered out of the estate, until the whole of the fund was recovered; but that the accruing interest would go to the tenant for life, as to whatever might be recovered.²

3. But where one became bound to pay, three months after his decease, to trustees, a certain fund, upon trust for a tenant for life and remainder-man, with interest from the date of his death until payment, and several years after his decease assets were recovered

¹ Ante, § 25, pl. 13 et seq.

² Grabowski's Settlement, L. R. 6 Eq. 12.

sufficient to pay a sum less than the whole amount due, it was decided that the sum so recovered should be apportioned ratably between the tenant for life and the remainder-man.³

4. Where a large sum was paid by the estate, several years after the testator's decease, on the compromise of a claim founded in alleged breach of trust, it was held that the sum paid must be regarded as constituted of a fixed sum at the time of the conceded breach of trust, and £5 per cent interest upon it till the time of the decease of the testator, and £4 per cent interest from that date till the time of payment, and that the amount, both of principal and interest, up to the time of the testator's death must be charged against the corpus of the estate, and only the after-interest against income.⁴

5. There often arise nice questions of this kind in regard to legacies in corporate shares, where the income is given to one party, during life or other period, and the remainder to others. In general, in such cases, the tenant for life will not be entitled to a bonus, declared upon such shares, after the decease of the testator, when it arises out of earnings before that time.⁵ This question is ably discussed by Chief Justice *Chapman*, in a recent case in Massachusetts,⁶ and the English cases are there extensively reviewed. It is there held, that additional shares issued by a corporation to the existing shareholders must be treated as capital, notwithstanding they represent the net earnings of the corporation.

6. This seems somewhat at variance with an earlier case in that state,⁷ where the right of the trustee to take additional shares made by the company, and which he sold in the market, was held to belong to the party entitled in remainder, and to be added to the corpus of the fund. The early English cases seem to regard the net earnings of the company as legitimate income, and to belong to the tenant for life.⁸ Lord *Eldon* here said, it made no difference whether the dividend was in money or stocks: in either form it belonged to the tenant for life. And the same rule was

³ *Cox v. Cox*, L. R. 8 Eq. 343.

⁴ *Maclaren v. Stainton*, L. R. 11 Eq. 382.

⁵ *Maclaren v. Stainton*, 27 Beav. 460; *Lock v. Venables*, id. 598. But in *Bates v. MacKinley*, 31 Beav. 280, such a bonus was held to be income, and to belong to the tenant for life.

⁶ *Minot v. Paine*, 99 Mass. 101.

⁷ *Atkins v. Albree*, 12 Allen, 359.

⁸ *Paris v. Paris*, 10 Ves. 185.

followed in later cases.⁹ And many of the American cases follow the same rule, even where the net earnings are distributed in the form of additional shares.¹⁰

7. But in a somewhat late English case,¹¹ it was held by an eminent equity judge, the late Lord Chancellor *Hatherly*, that new shares must be treated as an addition to the corpus of the fund, it being competent for the company to convert income into capital in this mode. The old rule seems to us more reasonable and just, but clearly more liable to produce embarrassment in practice.

8. It must now be recognized as the settled doctrine in regard to joint-stock shares, held by tenant for life and remainder-man, that the question, what is income and what is capital, must be determined by the action of the company, in conformity to its constitution. In a very late case¹² the question is carefully considered by the Lord Chancellor *Hatherly*, and able counsel, and the cases extensively reviewed, and the conclusion, above stated, fully confirmed. In this case the constitution of the company gave the majority in value of the shareholders power to dispose of the profits, by adding them to the capital, or dividing them, in their discretion. There was at the death of the tenant for life a large amount of profits standing to the credit of the profit-and-loss account, the greater part of which had been sunk in the works. It was held that these profits belonged to the remainder-man, and not to the executor of the tenant for life. Lord *Hatherly* said: "There is no question the money in dispute was profits." . . . "It does not follow that, because this money was profits, therefore it must be divided." His lordship considered if there had been no resolution of division, and the money had all along been dealt with as capital, it must be so held now. And the same rule seems to be recognized by Vice-Chancellor *Shadwell* as early as *Price v. Anderson*,¹³ where the learned judge held that an increased dividend must be treated as all income, notwithstanding the company might have declared, if they had deemed it proper, that a portion should be

⁹ *Clayton v. Gresham*, 10 Ves. 288; *Witts v. Steere*, 13 Ves. 363; *Barclay v. Wainwright*, 14 Ves. 66.

¹⁰ *Earp's case*, 28 Penn. St. 368; *Clarkson v. Clarkson*, 18 Barb. 646.

¹¹ *Barton's Trusts in re*, L. R. 5 Eq. 238.

¹² *Straker v. Wilson*, L. R. 6 Ch. App. 503.

¹³ 15 Sim. 473. There are some late cases in this country where this view is maintained.

added to the capital. But in the very late case of *Jones v. Ogle*,¹⁴ the full Court of Chancery Appeal held, where the testator bequeathed the dividends and income of his share in a partnership or joint-stock company of which he was a member to one for life, and after his death to his daughter absolutely, and the custom of the company was to settle the accounts of the concern for each year in the month of January following, and then declare the dividend for the preceding year, payable by instalments in the next two months, and the testator died in October, 1870, that the dividend declared in January following was not apportionable under the English statute, but belonged wholly to the tenant for life.

9. Assessments upon real estate by way of betterments on account of municipal improvements are to be treated as an addition to the capital, and the tenant for life only charged with interest thereon as a deduction from the income of the estate thereafter.¹⁵ So the expense of the insurance of buildings and of putting lightning-rods upon them are to be apportioned between the life tenant and him entitled in remainder. So also of a municipal assessment for flagging the sidewalk.¹⁶

¹⁴ L. R. 8 Ch. App. 192. Lord Chancellor *Selborne* here gives very satisfactory reasons why he could not regard the construction of the words of a will as affected by a statute passed after its execution.

¹⁵ *Plympton v. Boston Dispensary*, 106 Mass. 544.

¹⁶ *Peck v. Sherwood*, 56 N. Y. 615.

GUARDIANSHIP.

SECTION I.

OF INFANTS, OR PERSONS NOT OF FULL AGE.

- 1 and n. 1. Different kinds of guardianship at common law. Guardians by nature.
2. Guardians ad litem, and the mode of appointment.
3. Statutory guardianship of infants under the administration of the probate courts.
4. This has reference to the protection of property mainly. Guardianship of the person not much regarded here, where it exists, except in the parents and those *in loco parentis*.
5. Statutory guardians selected primarily, with reference to competency to manage the property. But often have charge of the person of the ward.
6. The powers of guardians do not extend beyond the limits of the State.
7. Statutory guardians are exclusive of all others. Special guardianships should be conferred on them.
8. Have charge of property of wards and of their persons next after parents.
9. Contracts between guardians and wards, how treated in courts of equity.
10. The relation of guardian and ward strictly fiduciary.
11. The guardian can derive no profit from the trust.

§ 50. 1. THE guardianship of children, while under the legal disabilities of infancy, is one coming so directly under the cognizance of the probate courts, in the settlement of estates, that a brief outline of the law upon that subject seems to be demanded in this portion of our work. At common law there were many kinds of guardianship which have never existed in this * 435 country.¹ * Those which now obtain here are three :

¹ 4 Burn's Eccl. Law, 100, where the different classes of guardians are thus defined :—

“ By the common law, there were four sorts of guardians : 1. Guardians *in chivalry*. If the tenant by knight's service died, his heir male being under twelve years of age ; in such case, the lord should have the land holden of him, until the heir should attain the age of twenty-one, and likewise the marriage of the heir, if he was unmarried at the death of his ancestor ; if there was an heir female, under the age of fourteen, and unmarried, then the lord had the

1. Guardians by nature, which only embraces the father and mother, and during the life of the former devolves solely upon

wardship of the land till her age was sixteen, and was to tender to her covenable marriage without disparagement. And this sort of guardianship was a kind of dominion of lords over their tenants, and was introduced among the Gothic nations, to breed them to arms; but is now fallen with the tenures, for by this same statute all tenures by knight's service and in capite are taken away, and turned into free and common socage. 2. Guardian *by nature*; as the father is of his eldest son, till he comes to the age of twenty-one years. But this is with respect to the custody of the body only. And this extendeth only to the heir apparent, and not to the younger children; the true reason of which is, because they cannot inherit any thing from him. But it extendeth to the daughter, while she is heir apparent, but not after the birth of a son, for then he is heir apparent, and not the daughter. 3. Guardian *in socage*: And this is, where the tenant in socage dies, his issue, whether male or female (or if no issue, his brother or cousin), being under the age of fourteen; in which case the next of blood, to whom the inheritance cannot descend, shall have the wardship of the land and body, till the age of fourteen years. 4. Guardian *by nurture*: And this may be, though no land descends; whereas guardian in socage must be, where land in socage descends. And such guardian hath nothing but the governance of the child, until the age of discretion: to wit, fourteen years, whether the infant be male or female. And none can be guardian by nurture, but the mother or father. 1 Inst. 88 b; Viner, Guardian, n. 2.

“Guardians appointed by the spiritual court are only for the personal estate; guardians for the real estate were heretofore under the direction of the court of wards and liveries, which court being taken away by this statute, power is given by the same statute to the father by his deed or will to appoint guardians; which if he shall not do, or if the guardians appointed by him shall die or refuse to act, then the power devolveth upon the High Court of Chancery, the Lord Chancellor (under the king) being the supreme guardian of all infants and others not capable to act for themselves.

“In the case of *Buck and Draper*, March 26, 1747, a petition was preferred to the Lord Chancellor *Hardwicke* by the mother of the infant, to discharge an order of the Master of the Rolls appointing the plaintiff guardian of her daughter, upon an allegation of his unfitness, as being disordered in his mind, and that she, the mother, had long before been appointed guardian of her daughter by the Ecclesiastical Court at York, and had by virtue of that appointment taken possession of the infant's person and estate. The Lord Chancellor dismissed the petition with costs, the facts of the lunacy being not at all made out, and said, he was surprised upon what pretence the ecclesiastical courts in the country take upon them to appoint guardians *ex officio*, without any suit instituted for that purpose, and by this means break in upon the jurisdiction of this court with respect to the guardianship of infants, and said, he recommended it to the attorney-general to consider, whether a quo warranto might not issue to the Ecclesiastical Court, upon such an extrajudi-

* 436 him.² But this species of guardianship * is not regarded as extending beyond the custody and control of the person of the infant, and his maintenance, support, and education; and will not empower the father, or mother, as such guardian, to assume the possession and management of the estate of the infant.³ But the courts of equity have a superior control over this kind of guardianship, and for cause may remove children from the influence and control of the parents. But this will only be done in extreme cases, where otherwise the child or children will be likely to suffer irreparable injury, and then only where the child has property which may be applied for its support. But the jurisdiction is clearly established in the English chancery.⁴ Guardianship by nurture is still named in discussing the general subject, by most of the American writers, but as it was only the complement of guardianship by nature, the latter only extending to the eldest

cial appointment of guardians to infants, where no suit at all is depending for this purpose."

² This species of guardianship at common law extended only to the person of the heir apparent. Hargrave's note, 66, Lib. 2, Co. Litt. But as all the children here are equally heirs apparent to the estate of their parents, there seems to be no reason why this species of guardianship should not extend to all (2 Kent, Comm. 220), and be exercised by the father, while living and competent, and by the mother, upon the decease or inability of the father.

³ *Dagley v. Tolferry*, 1 P. Wms. 285; *Cunningham v. Harris*, cited in argument in *Cooper v. Thornton*, 3 Br. C. C. 186. But where the will directs the legacy paid to the parent, or expresses it to be for the maintenance and education of the infant, it is proper for the executor to make payment accordingly. *Cooper v. Thornton*, supra; *Robinson v. Tickell*, 8 Vesey, 142. The doctrine of the text is upheld in *Miles v. Boyden*, 3 Pick. 213. See also *Jackson v. Combs*, 7 Cow. 36; s. c. 2 Wend. 153; *Genet v. Talmadge*, 1 Johns. Ch. 3.

⁴ *Wellesley v. Wellesley*, 2 Bligh, N. s. 124, 128 to 145. But it was held in the late case of *Curtis v. Curtis*, 5 Jur. N. s. 1147; s. c. 7 W. R. 474, that the Court of Chancery have no jurisdiction to remove a child from the custody of the father or mother merely because it would be for the benefit of the child; or on account of the peculiar religious opinions of the father, or of his harsh temper or the commission of acts of harshness or severity, not such as would be injurious to the health of the child. See the case of *Mary Ellen Andrews*, 21 W. R. 480; s. c. L. R. 8 Q. B. 153, where the Court of Queen's Bench on habeas corpus declined to enforce a contract between father and mother in contemplation of the marriage, to the effect that the daughters of the marriage should be educated in the religion of the mother, she being a Protestant, while the father was a Roman Catholic. But the rule was acknowledged to be otherwise in the court of chancery. *Hill v. Hill*, 10 W. R. 400; *Hawkesworth v. Hawkesworth*, 19 W. R. 735; s. c. L. R. 6 Ch. App. 539. See post, § 53, pl. 5 et seq.

child, who inherited the real estate, and the former embracing the younger children, who were not included in the former species, and extending only to the age of fourteen, it seems very clear that both species are here merged in one.⁵

2. In the next place we may name guardians ad litem, which * every court has the power to appoint, in all causes * 437 pending before it, where infants are parties, or where their rights are liable to be affected by the proceeding. In many cases the general guardian of the infant appears for him, without any formal appointment by the court. But as in all cases at common law, the judgment against an infant, where the appearance is by attorney merely, or where it is rendered without the appointment of a guardian ad litem, even where there is no appearance by the defendant, may be reversed upon writ of error, it is important that the recognition of the guardian, as such, should appear of record.⁶ And it seems to be the settled practice of the courts, not to recognize the appearance of the general guardian for an infant, without a special order for the purpose.⁷ And it has been held, that the court will not appoint as guardian ad litem of an infant defendant, a person unconnected with the infant, and not interested in the suit.⁸

⁵ The most careful and the more recent text-writers, English as well as American, treat these two former species of guardianship (by nature and by nurture), as practically blended since the period of the removal of the feudal restraints upon land tenure in England, in the time of Charles II. Schouler, Dom. Relations, 391, citing *McPhers. Inf.* 52, 58; 2 Kent, Comm. 220, 221; 1 Bl. Comm. 461, and Harg. notes 1 and 2.

⁶ *Castledine v. Mundy*, 4 B. & Ad. 90; s. c. 24 Eng. C. L. 30; *Chase v. Scott*, 14 Vt. 77; *Mason v. Denison*, 15 Wend. 64, and cases cited in note to second edition. A guardian may appear in any suit against his infant ward, even where no process has been served upon such guardian. *Cowan v. Anderson*, 7 Cold. 284. Where personal service upon the ward is indispensable, the guardian cannot waive it; but he may waive such service upon himself, as guardian, *ib.* See also *Greenman v. Harvey*, 53 Ill. 386.

⁷ *Mathewson v. Sprague*, 1 Curtis, C. C. 457; Har. notes, 70 and 220, to Lib. 2, Co. Litt.

⁸ *Foster v. Cantley*, 17 Jur. 370; s. c. 19 Eng. L. & Eq. 437. And a guardian ad litem for infant defendants should not be appointed, at the mere motion of the plaintiffs in the suit, where the defendants desire to make an appearance; and where such an appointment had been made without the consent or knowledge of the defendants, it was cancelled, and an appointment made in conformity with the choice of the infants. *Matter of Water Commissioners*, 4 Edw. Ch. 545. An infant plaintiff always appears by *procchein ami*,

3. We come now to the consideration of statutory guardianship of infants, which is the only species which can properly be regarded as of such practical importance in this country as to require treatment in this place. These appointments, and the duties resulting therefrom, are regulated, as the name indicates, almost exclusively

by legislative provisions, in the different states; but in all
 * 438 essentially * the same, and always under the control of probate courts, or courts having exclusive jurisdiction of the settlement of estates, whether called surrogate's or the orphans' courts, or by whatever other name designated.

4. These appointments of guardians of infants,⁹ in the probate courts, are primarily for the protection of their pecuniary, or property rights. Those kinds of guardianship in England, by judicial appointment in the Court of Chancery, which had reference to the custody, maintenance, and education of the infant, have not much obtained in this country. Thus, testamentary guardians, which exist in England under statute,¹⁰ and which are controlled

and not by guardian ad litem, unless where the suit is brought into court by an infant plaintiff in his own name, and without the intervention of any guardian or prochein ami; where it would, no doubt, rest in the discretion of the court, upon the suggestion of the infant or his counsel, to appoint a guardian ad litem for the prosecution of the suit, or to allow some one to enter as prochein ami. And it has been held, that an infant, under statutory guardianship, may sue by prochein ami, where the guardian does not object; and there are cases where he may sue even against the will of the guardian. *Thomas v. Dike*, 11 Vt. 273, 275, 276, by *Williams*, Ch. J. In some of the states the statute requires the statutory guardian to defend suits against the ward. *Rankin v. Kemp*, 21 Ohio, N. S. 651.

⁹ Toller's Exrs. 100. It is here said that a distinction exists in the denomination of persons not of full age, between infants and minors; that the term "infant" is only applicable while the person is under seven years of age, and after that they are called "minors;" and that the minor nominates his own guardian, who will be admitted by the court, if of the class of those next of kin, and where there is no special reason for preferring others. But guardianship for nurture ceases only at the age of fourteen, and, in general, that is the age at which infants are allowed to choose guardians. 4 Burn's Eccl. Law, 101; 1 Inst. 74, 87, 88; Vin. Ab. Guardian, n. 2. And in regard to any distinction in legal phraseology between infants and minors, we are not aware that it obtains, in any such definite sense as intimated by Mr. Toller. In popular language some such or similar distinction may be made in the use of these terms. But in the language of the law, so far as we know, the term "infant" is in general use for designating persons of all ages until they become of full age and sui juris, and thus entitled to act for themselves.

¹⁰ 12 Car. 2, ch. 24. The right under this statute has been held by the

mainly by the courts of equity, will never be found to exist in this country, except by statutory provisions.¹¹ We have had

English court of probate to extend to having a guardian named, by one of the surviving guardians, to fill the place of a deceased guardian appointed by the will, when such authority is contained in the will. Parnell in re, L. R. 2 P. & D. 379.

¹¹ 2 Story, Eq. Jur. §§ 1351, 1352, et seq. This question has lately come under the consideration in the Court of Chancery Appeal, in regard to two children of a deceased clergyman of the Church of England, aged respectively fifteen and eleven years. The father by will appointed another clergyman of the Church of England and his widow guardians of his children. The widow, after the decease of her husband, had allied herself with the sect called Plymouth Brethren, who seemed to entertain very loose notions, both in regard to Christian doctrine and discipline, and allow all members to preach and teach in their assemblies, who feel themselves moved thereto by the Holy Ghost. Upon petition of the other guardian it was ordered, that the mother should not be allowed to take the children to attend the worship of any other body of Christians than the Church of England, but that they should be brought up as members of that church. The court declined to see the children, or to consult their preferences upon the subject; regarding that as being quite unimportant in settling the question; saying that it was the duty of the court to see that the children were *bonâ fide* brought up in the religion of the father, and to remove the mother from the guardianship, if she persisted in her efforts to bring them under the influence of any other Christian teaching. *Re Newbery*, 12 Jur. N. S. 154.

But the English courts of chancery often find themselves embarrassed by applications to vindicate the right of paternal control under perplexing circumstances. In a recent case, *Re Esther Lyons*, 18 W. R. 238, before the Court of Chancery Appeal, Lord Justice *Giffard* declined to interfere with the custody of a Jewish girl, eighteen years of age, who had fled from her parents and put herself under the protection of a proselyting sect of Christians in Wales, of some of the members of which the father had recovered a verdict and £50 damages for enticing his daughter away from his service, and now sought to have the money and £50 more settled upon the daughter, and thereby to bring her under the control of her brother as guardian in chancery. There was some evidence that the father had attempted to regain the custody of his child by force. The Vice-Chancellor *James*, before whom the case was first tried, had an interview with the child, and ascertained that she desired to remain a Christian, and in her present relations, and that she was in great dread of her father, and extremely unwilling to return to his house. The Vice-Chancellor refused to make any order in regard to guardianship, but upon the person having the custody of the child entering into recognizance to produce her upon any application by habeas corpus, decreed that the father be restrained from attempting to regain possession of his child otherwise than by legal process.

* 439 occasion * already, to allude to this subject incidentally.¹²

But as incident to the disbursement of the infant's property, the guardian is entitled to control the person of the infant, and if that right should be attempted to be interfered with by mere

* 440 strangers, or those not * parents, or in loco parentis, the court will vindicate the right of the guardian to control the person of his ward by habeas corpus, or other appropriate remedy. But the guardianship of the person of infants in chancery, which the English courts of chancery derive from the sovereign as *parens patriæ*, does not exist here. But the parents, and those standing in loco parentis, have the entire control of the person and education of infants, except as it may be controlled by statutory guardians, through the influence of property rights, or by express statutory provisions, which, in many of the states, give the guardian the control of the person of the ward.¹³

¹² Ante, Vol. I. pp. 4, 5, 6 ; Vol. III. § 4, pl. 9. Mr. Chittenden, in his note to this portion of Judge Reeves's work on Domestic Relations, states that the English statute giving the right to the father to appoint testamentary guardians for his children, has been largely adopted in the United States, with the exception of New England, p. 315, n. (2). It has unquestionably existed in many of the American states for a long time. It has been substantially in force in Massachusetts for many years. Gen. Stat. ch. 109, § 5, which enacts : " A father may by his last will in writing appoint guardians for his children, whether born at the time of making the will or afterwards, to continue during the minority of the child or a less time. Such testamentary guardian shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed by the probate court." The same or similar statutes exist in New York, New Jersey, Virginia, and Ohio, North Carolina, Georgia, Alabama, and Tennessee. In some states the appointment is required to be by last will, and in others it may be either by deed or by will, the same as under the English statute of 12 Car. 2, ch. 24 ; 2 Kent, Comm. 224, and notes. This provision both under the English statute and those of the American states seems to extend only to the father. It has been held not to apply to the grandfather, *Hoyt v. Hilton*, 2 Edw. Ch. 202 ; nor to the mother, *Matter of Pierce*, 12 How. Pr. 532.

¹³ Mass. Gen. Stat. ch. 109, § 4. In some of the states statutory provisions exist, whereby guardians of the person of infants may be appointed by the probate court, upon notice to the father, or to the mother, where the infant is under her care. *Redman v. Chance*, 32 Md. 42. And if the infant has property, although it may not be proper for the probate court to commit the guardianship to any other but the parents, if living and competent, it will nevertheless be proper for the court to require the father, and, in case of his

5. We would not, by any means, be understood as saying that the probate courts, in the selection of guardians for infant children, should not be largely influenced by considerations of the fitness of the persons selected to conduct the education of their wards. There is no manner of question, that is and should be a paramount consideration in the selection, other things being equal ; and especially where the guardians have by statute the control of the person of the ward, as is the fact in some states.¹⁴ But the primary and leading qualification for one seeking to become the guardian of infants, under our statutory, probate guardianship, unquestionably is, entire competency to manage with discretion, skill, and due responsibility, the property of the wards. It seems to be assumed that one who is entirely competent in this particular, will not be likely to fall into any very extreme views, or dangerous vagaries, in regard to the education of his wards. And, as a general thing, we think this will be found true. Such men generally comprehend that they do not understand the subject of education very critically, and are by consequence more teachable in regard to it. They are generally content to leave that to the control of the near relatives of the wards, who have the deepest interest in regard to it, and will commonly give the most judicious heed to it. And it seems to have been the practice, from a very early day, to leave the education of infant wards of the courts, deprived of both parents, largely to the agency of near relatives, who must supply the place of the parents more than the guardian.¹⁵

decease, the mother, to accept a formal appointment of guardianship, under the usual conditions of giving bonds and rendering account. *Duncan v. Croke*, 49 Mo. 116.

¹⁴ Mass. Gen. Stat. ch. 109, § 4.

¹⁵ 1 Domat, 1296-1298 ; L. 1, C. L. 5, § 11 ; D. L. 5, § 8 ; D. of the Laws of Just. Some of the states, either by constitutional or statutory provisions, extended the statutory guardianship to the person as well as the estate of infants. *Wilson v. Roach*, 4 Cal. 362. The order of selecting guardians for infants under fourteen years of age, where the father and mother are both dead, is : 1. The paternal ; 2. The maternal grandfather ; 3. One or more uncles on the father's side ; 4. One or more uncles on the mother's side ; 5. Any other proper person. 2 Kent, Comm. 227, and note. By a recent decision of the Supreme Court of California, *Lord v. Hough*, 37 Cal. 657, the doctrines of guardianship, at common law, and in that state are fully defined. Those at common law are stated to be, by nature, for nurture, in socage, and in chivalry. Testamentary guardians by the Stat. 12 Car. II. c. 24, were substituted for guardians in chivalry, and made to take precedence of all other

* 441 * 6. The powers and rights of guardians appointed by the courts of one state are considered to be limited to the state where made,¹⁶ except that where the guardian receives property in the state where appointed, which it is his duty to hold and manage for the best interest of his ward, his conveying it into another state for sale, would not, probably, defeat his title, or require his reappointment there; and especially where others carried the property of the ward out of the state to keep it away from the guardian, he might, by virtue of his possessory right in the state of his appointment, if upon no other ground, maintain an action either in the state of his appointment or elsewhere, to recover the property, or damages * for its abstraction or detention. But as to choses in action belonging to the ward, the guardian would be bound to collect them in due time, and if he suffered them to depreciate in consequence of his neglect or delay, he would

kinds of guardians, and like all other kinds of guardianship, the testamentary guardian was made subject to the supervision of the Court of Chancery, and could be removed for cause. This is upon the ground that all guardians are trustees, and that all trustees are subject to the control of that court. But like all other trustees, guardians are only liable to removal for sufficient cause, shown or apprehended. Under the statute of California the power to appoint guardians is vested first in the father, next in the mother, and finally in the probate court. The testamentary guardian here has only the powers of a probate guardian, and cannot, therefore, take the personal custody of the ward, so long as there is a mother, who is competent, willing, and worthy to have the custody and tuition of her children. If the father dies, having appointed a guardian for his children by his last will and testament, but leaving a widow who is a qualified and fit person to have the personal custody of her children, such widow is entitled, if she so desires, to the personal care and custody of them. In such case the power of the testamentary guardian only extends to such special directions as the father may have given in his will with reference to the education and settlement of his children, and the care and management of their property, and does not include the personal custody of the children, if objection thereto be made by the mother. *Ib.* The statutory guardian possesses, as incidental to his office, the power to sell the personal estate of his ward. *Wallace v. Holmes*, 9 Blatch. 65. And he may lease, but cannot sell his ward's real estate, without special license. *Richardson v. Richardson*, 49 Mo. 29; *Emerson v. Spicer*, 46 N. Y. 594.

¹⁶ *Metcalf on Contracts*, 155; *Story, Conflict of Laws*, §§ 499, 504, 504 a; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Himes v. Howes*, 13 Met. 80; *Potter v. Hiscox*, 30 Conn. 508. See post, § 53. Guardian's bond executed under the statute in one state is regarded as wholly a statutory proceeding there, and cannot be enforced in another state. *Probate Court v. Hibbard*, 44 Vt. 597; *Pickering v. Fisk*, 6 Vt. 102.

become chargeable with such depreciation, although the debtor resided in another state.¹⁷ And a natural guardian, entitled to the custody of his children, will obtain the aid of foreign courts to enforce his rights in regard to that custody and control, according to the law of his domicile. And where, by order of the courts of one state, the custody of the children is decreed to the mother, either permanently or for a time, during the pendency of an action, or procedure for any purpose, and the father, in violation of such order, obtains the custody of the children, and carries them into another state, the courts of the foreign state will restore the custody to the mother in conformity to the order of the domestic tribunal.¹⁸

7. Chancellor Kent thus declares the rule of law¹⁹ as applicable to this country, that where there are no natural or testamentary or statutory guardians for infants, who have property within the state, it will become the duty of the Court of Chancery, by virtue of its general care and supervision of the interests of infants, to appoint guardians who will act as such until the infants come of age, notwithstanding the appointment of statutory guardians in another state. But this, we apprehend, is not the present state of the law in most of the American states. There can be no manner of doubt, we think, that where the statute provides the mode of appointing guardians, that mode must be regarded as exclusive of all others, for the purpose for which the statutory guardians are appointed, and that is generally the care and custody of the property of the infant and of the person, where both father and mother have deceased or become incompetent. There are always liable to arise exceptional instances, where guardians are required for special purposes or occasions, as those *ad litem*; and in such cases, the appointment is not, as matter of course and in all cases, confined to the same person who is statutory guardian. But as a general thing, all special guardianships should be conferred upon * the statutory guardian, and we suppose such will ordi- * 443 narily be the course of practice.

8. We apprehend, as a general rule, statutory guardians of infants, as well as of persons of unsound mind, where such infants

¹⁷ *Potter v. Hiscox*, 30 Conn. 508.

¹⁸ In the Matter of *Mrs. Lewis* and her children, before the courts of New York, at Chambers.

¹⁹ 2 Comm. 226.

have no father or mother to take charge of them, will be understood to possess the power of control over the person of their wards as well as their property. This is certainly so by express statutory enactments²⁰ in some of the states.

9. Contracts made between guardian and ward, affecting the pecuniary interests of the ward, are always looked upon with suspicion by the courts, on account of the relation of the parties, and the presumptive influence and control of the guardian over the judgment and discretion of the ward.²¹ And in such cases it is

²⁰ Mass. Gen. Stat. ch. 109, § 4, which is substantially the same as the rule laid down in the text. And the Vermont Gen. Stat. ch. 72, §§ 5, 6, is to the same effect. In the absence of any direction or expressed preference by the father, deceased, as to the guardianship or religious education of his children, the clearly expressed wishes of the mother will be regarded. And where application for the guardianship of a child was made both by the paternal and maternal grandfathers, both being of equal competency and fitness, the guardianship was given to the maternal grandfather, in accordance with the wishes of the mother. In *re Anne Turner*, 4 C. E. Green, 434. By the New York statutes, Acts of 1860, ch. 90, § 9, the father is restrained from appointing a testamentary guardian for his children, except by the consent of the mother, if living; and in that state married women, by the Acts of 1867, ch. 782, § 2, are declared as capable of being appointed to the office of guardians of minors, as single women. But the Surrogate may, in his discretion, revoke the appointment of a single woman as guardian, after her marriage. *Mary Elgin's Case*, Tucker's Sur. Rep. 97. And there is a provision by statute in some of the states for the appointment of probate guardians, while the father is living, whose powers, being limited to the infant's estate, will not conflict with the right and duty of parental control. And we apprehend that practically, where either of the parents of infants are living and capable of having the custody of their persons, and the conduct of their education, that it is surrendered exclusively to them; the guardian, at most, only having charge of the estate of the ward, and in many cases even that is surrendered to the custody and control of the parent or parents, as either or both may be living. Mass. Gen. Stats. ch. 109, § 4; *Clark v. Montgomery*, 23 Barb. 464, cited by Schouler in Dom. Rel. 415, q. v. As to the general propriety of appointing married women guardians of infants, see Schouler, Dom. Rel. 418.

²¹ 1 Story, Eq. Jur. §§ 317-320. And a contract by which a minor mother has surrendered the guardianship of her fatherless child to a man and wife, for support and education, will not preclude the probate court from appointing another guardian of the child, with the mother's consent. *Gloucester v. Page*, 105 Mass. 231. And where the statute provides for the adoption of children, and that such adopted children shall have all the rights of children born to such person, so adopting, in lawful wedlock, the statute is valid, and a decree of the probate court confirming such adoption cannot be impugned for any mere informality. *Sewall v. Roberts*, 115 Mass. 202.

generally incumbent upon those who claim to maintain such contracts, to show that they are fair and equal, the legal presumption being otherwise.²¹ But the Court of Chancery will sanction * any contract between the ward and his guardian, * 444 when he is nearly of full age, if it appears just and equal, and for his benefit, as the procuring a dwelling for the family, the mother being the guardian, and the children wards.²²

10. We cannot, of course, go much into detail in regard to the kind and degree of watchfulness which courts of equity exercise over the dealings between the guardian and his ward, affecting the estate of the ward, either during the subsistence of the relation, or so soon after its termination that the ward may fairly be presumed not fully to have escaped from the influence of his former dependent position. But after the cestui que trust has become sui juris, and been fully informed of all his rights and the mode of defending them, and has in all other respects fully recovered the self-reliance of his independent position, his contracts, even with the former trustee, will bind him.²³ And the acquiescence of the cestui que trust under similar circumstances will exonerate the trustee,²⁴ as to his management of the trust fund.

11. As we shall have occasion to say elsewhere,²⁵ the guardian, in common with all others standing in a fiduciary relation, cannot make any profit to himself out of the trust, but all which accrues must go to the cestui que trust. Nor can the guardian buy any of the property belonging to the trust except at the election of the cestui que trust to hold it void.

SECTION II.

GUARDIANSHIP OF PERSONS NON COMPOTES MENTIS.

1. The guardianship of idiots and lunatics mostly in the probate courts.
2. The mode of obtaining commissions of lunacy.
3. The commission issues to competent persons, and the trial is by jury.

²² *Perry v. Perry*, 18 W. R. 482, before the M. R. Ireland.

²³ *Burrows v. Walls*, 5 DeG., M. & G. 233.

²⁴ *Griffiths v. Porter*, 25 Beav. 236; *Liddell v. Norton*, 21 id. 163; *West v. Sloan*, 3 Jones, Eq. 102.

²⁵ Post, §§ 59, 65.

- n. 3. Opinion of *Walworth*, Chancellor, in regard to granting repeated commissions, where the commissioners differ from the jury.
4. Applications for revision generally favorably listened to by courts.
5. Guardians in such cases have the control of the persons of their wards.
6. The guardianship of spendthrifts comes properly under this head. Its character defined.
7. It is exclusively statutory, and imported from the civil law. How defined there.

§ 51. 1. THE jurisdiction of the Court of Chancery in England over idiots and lunatics, which terms are used to embrace all classes of persons of unsound mind, has been generally, in this country, transferred to the courts of probate in the several states. But in some of the states the jurisdiction is still retained in the Court of Chancery,¹ or was until a comparatively recent date. But the course of proceeding is much the same, in whatever jurisdiction.

2. The important preliminary consideration, on which all proceedings against persons of alleged unsound mind turn, is the finding of the fact of mental incapacity to have charge of their own property and business interests. This is done by means of a petition from the near relatives or friends of the person, or in some cases, by special statutory provisions, by the civil authority of the municipality responsible for the maintenance of such persons; the petition setting forth the grounds upon which the commission is proposed to be sustained, praying that it may issue for determining the fact whether the person is in a condition to be properly subjected to guardianship.

* 445 * 3. The commission issues to one or more suitable persons, competent to investigate and report upon the facts of the case, and who are directed to give timely notice to the person against whom the proceeding is taken, and to summon a jury for the trial of the important issue involved, whether the person is, or is not, of unsound mind, and thereby rendered incompetent for the management of his own affairs, whose unimpeached verdict will be conclusive upon the facts,² unless for sufficient cause the court should award a new commission, which they often do, to the same persons, to take a new inquest.³

¹ In re Lasher, 2 Barb. Ch. 97.

² 2 Story, Eq. Jur. § 1365.

³ In re Lasher, 2 Barb. Ch. 97. The opinion of the learned Chancellor *Walworth*, in this case, will be of interest in this connection. There is no irregularity, or defective finding of the jury in this case. And the only questions

4. There are numerous modes in which persons restrained of liberty by commissions of lunacy may seek redress. But the more common one is by petition to the tribunal granting the commission. This is, sometimes, not a little difficult to have made effectual, by reason of the reluctance of others to interfere with the primâ * facie rights of the committee, and the prestige nat- * 446 urally caused by an adjudication of the question upon an inquest of the jury. But the admitted fact of the facility of committing the most flagrant outrages upon personal rights, by means of commissions of lunacy, generally renders the courts favorably

for consideration are whether the court has the power to award a new commission ; and if so, whether this is a proper case for the exercise of the power. In the case *Ex parte Glen* (4 Desau. Rep. 546), the Court of Chancery in South Carolina refused an application for a new commission, to inquire of the lunacy, upon the merits. But it appears to have been taken for granted that the court had the power to direct a new commission to be issued, in a proper case, although the jury had decided in favor of the competency of the alleged lunatic, and there had been no irregularity upon the execution of the commission. Shelford says, that where a regular return is made, if there is sufficient evidence in the case to satisfy the chancellor that the party is a proper subject for a commission, a new commission will be directed to issue. And in the case of *Donegal* (2 Ves. Sen. 408), Lord *Hardwicke* remarked, that in Lord *Weninan's* case no less than three commissions were applied for, before he was found non compos mentis. I have no doubt, therefore, that the court has the power, in the exercise of a sound discretion, to direct the issuing of a new commission, where from the evidence, or otherwise, there is no doubt that the jury must have erred in finding that the party proceeded against was not of unsound mind. "In this case, in addition to the unanimous opinion of the commissioners that Mrs. Lasher is a lunatic, they have returned all the testimony which was before the jury upon the execution of the commission. And from an examination of that testimony there does not appear to be any room to doubt that this lady now is, and for several months has been, afflicted with mental derangement, so as to be incompetent to govern herself, or to manage her estate. A new commission must therefore issue, to inquire whether she is a lunatic, or of unsound mind, directed to the same commissioners." There seems to be some question how far a general appeal lies from the court of probate of first instance to the superior or supreme court of probate, upon questions of discretion in the appointment of guardians, such as the fitness of the person to be appointed. We apprehend there can be no doubt that an appeal does in general lie in such cases, where the general appeal in probate is allowed to a superior court, with the right of carrying all questions of law to a still higher court for the correction of errors. In such case the decision of the appellate court will be final upon all questions of discretion, and they cannot be reversed by the court for the correction of errors in law merely. *Weeks's Appeal*, 37 Conn. 363.

inclined to listen to such applications. And it is well it should be so, even where a large proportion of the applications for revision are not founded upon substantial grounds.

5. From the nature of the case, where guardians are appointed by reason of the incompetency of the wards to manage their own affairs through defect of understanding, as in the case of idiots and insane persons, the guardian should have the control of the person of the ward as well as of his estate. And here, especially in regard to insane persons, there is often great wisdom to be exercised in making the proper selection, since the office is not only one of great delicacy, and sometimes of extreme difficulty, but it is one requiring peculiar gifts not equally possessed by all gifted persons. It requires a peculiar instinct, so to speak, a kind of natural gift or intuition in regard to the particular morbid affection, and especially in regard to its influences upon the mental condition of the ward. So that not unfrequently, the nearest relations and friends are the least able to control the movements of insane persons in a manner acceptable to them. (a) It may have been partly upon this ground, that the established rule of the civil law not to appoint the husband to be curator of the wife, when mad, was founded. This rule seems to have existed in the Roman law from an early day,⁴ where the rule is thus stated. "In the cases, where it may be necessary to name a curator to a married woman, or to her who is contracted in marriage, whether it be on account of madness, or other causes, neither the husband,⁵ nor

(a) This question is somewhat discussed by *Ames, J.*, in *May v. May*, 109 Mass. 252, in settling the account of such a guardian. It is here said, that where the ward is a man of wealth he should be allowed those expensive indulgences which gratify his feelings and are not improper or unsuitable in themselves, in much the same manner as in the case of persons *sui juris*. Some expenditures are here passed upon in the particular case, but which are not of general application. The judge quotes with approbation the rule laid down by Lord *Eldon*, Chancellor, in *Oxenden v. Compton*, 2 Ves. Jr. 69, that the guardian in the management of the estate, should attend "solely and entirely" to the interest of the owners, without regard to the interest of any one as expectant heir, as "nothing could be more dangerous or mischievous" than for the guardian to have respect to any such considerations. The learned judge also here cites *Ex parte Baker*, 6 Ves. 8; *Dormer's case*, 2 Peere Wms. 262; *Ex parte Whitbread*, 2 Meriv. 99; *In re Persse*, 3 Molloy, 94; *Kendall v. May*, 10 Allen, 59.

⁴ 1 Domat, No. 1413.

⁵ L. 2, l. 14 D. § 19.

the person with whom she is contracted,⁶ can be named curators.”

*6. The guardianship of spendthrifts may very properly * 447 be considered under this head. This is a species of guardianship exclusively of a statutory character, and one the jurisdiction over which in most of the states is devolved upon the probate courts. It is created for the protection of the estates of such persons as, from intoxication, ill health, habits of excess, or any other cause, have become incapable of managing their own estates. It is required in all such cases that a proper inquest should be made, before a jury, into the mental competency of the person against whom any complaint of incompetency to manage his own affairs is made. This must be taken in the mode prescribed in the statute, and always upon timely notice to the party against whom the complaint is made.

7. This species of guardianship did not exist at common law, but had its origin in the civil law, from which it has been adopted into the statutory enactments of many of the states. By the civil law “those who lavish away their estate in foolish, extravagant expenses” were declared “prodigals” and judicially “interdicted,” and thus deprived of the administration of their affairs,⁷ and the management of their estate committed to a curator. But this could only be done upon hearing and full proof. And a son could not be appointed curator to his father, who had been declared a prodigal, although he might be to an insane father.⁷ The statutory provisions in the different states are somewhat similar.⁸

⁶ L. 1, § ult. D. de excus. tut. “This rule seems to be founded either on the interest which the husband may have in the office, which should require the appointment of a curator to his wife, or upon the inconvenience of making the husband accountable to his wife.” But possibly the true reason may be that the interests of the wife may be, in some degree, antagonistic to those of the husband, and often there exists more or less distrust or prejudice on the part of the wife towards the husband, so that on every account the guardian should be some one who will act independently of both.

⁷ 1 Domat, Pt. 1, Book II., tit. II., § 1, No. 1416, citing L. 1, D. l. 12, l. 15.

⁸ Mass. Gen. Stat. ch. 109, §§ 8, 9. The requisites for placing one under guardianship by this statute, as an insane person, are that he should be found “incapable of taking care of himself.” The section in regard to spendthrifts is: “When any person by excessive drinking, gaming, idleness, or debauchery of any kind, so spends, wastes, or lessens his estate as to expose himself or his family to want or suffering, or any place to charge or expense for the support

* SECTION III.

GUARDIANS APPOINTED IN FOREIGN STATE.

1. Foreign guardians will be allowed the custody of their wards.
2. It would be a pernicious principle to deny this.
3. Domestic guardians may be appointed to supplement the office of the foreign guardians, or the foreign guardians may be re-appointed here.
4. But the decrees of the foreign courts will be respected and followed as far as consistent with the laws of the forum.
5. Court of Chancery will prefer its ward to be educated in the faith of the father.
Exceptions.
6. Circumstances of exceptional case stated.
7. Testamentary guardian same right of control of ward as the father.
8. Antenuptial contract between father and mother not binding.

§ 52. 1. QUESTIONS in regard to the rights of foreign guardians, both as to the control of the person of their wards and their property, in another forum, will be extremely likely to be of frequent occurrence in this country, where the different states, for most purposes of this character, are regarded as entirely foreign to each other. The question was carefully examined by able counsel, and largely discussed before the present Lord Chancellor, *Hatherly*, while Vice-Chancellor, in *Nugent v. Vetzera*,¹ where it was held that infants, the subjects of a foreign state, sent to England for the purpose of education, by their guardian appointed by the foreign court, and where part of the property of the wards was in England, could not be interfered with or in any manner taken out of the control of such guardians either by the court itself or by guardians appointed by it.

2. The opinion of the learned judge upon this important question is full of instruction. He says, "It appears to me it would be

of himself or his family, the mayor and aldermen or selectmen of the city or town of which such spendthrift is an inhabitant, or resident, or upon which he is or may become chargeable, may present a complaint to the probate court setting forth the facts and circumstances of the case, and praying to have a guardian appointed. The court shall cause notice of not less than fourteen days to be given to the supposed spendthrift of the time and place appointed for the hearing; and if after a full hearing it appears that he comes within the above description, the court shall appoint a guardian of his person and estate."

¹ 12 Jur. n. s. 781; s. c. L. R. 2 Eq. 704.

fraught with consequences of very great difficulty, seriously contrary to all right and justice, if this court were to say, that when a parent or a guardian (for a guardian is in exactly the same position as a parent) in a foreign country avails himself of the opportunity afforded by this country for education for a certain period, and sends his children or his wards over here, that he must do it at the risk of never being able to recall them, if this court should be of opinion that English education is better than the education in the foreign country to which they belong." His lordship further illustrated the embarrassment which might arise if an English parent or guardian should send his children or wards to France or * any other foreign country, and the courts there * 449 should decide, as he was now asked to declare, that it was better, either for the purpose of education, or religious instruction, to take such children or wards from the custody of their parents or guardians, and place them under the control of guardians appointed in the foreign country, and concludes, "Surely such a state of jurisprudence would put an end to all interchange of friendship between civilized communities, and what I have before me is exactly that case." His lordship held the case of *Dawson v. Jay*,² where the ward was a British subject, although placed under foreign guardianship, was different in principle from the present case, where the child and the guardians were both Austrian subjects and the appointment made by an Austrian court.

3. The court held it proper to appoint guardians in England, who might have charge of the English property and supplement the foreign guardian's care of the children, if that became needful. But the foreign guardian was appointed guardian *ad litem*, and expressly directed to have charge of the person of the wards, and to have leave to apply to the court for permission to remove the children whenever it became proper in his judgment to do so.

4. And in another case before Vice-Chancellor *James*, during the present year, this subject was again largely examined both by court and counsel, and the following propositions maintained. Where an infant, a citizen of a foreign country, is sent to England, the Court of Chancery in England will carry out in all respects the orders of the courts of the foreign country in regard to the infant, so far as consistent with the laws of England. In this

² 3 DeG., M. & G. 764.

case the infant was a girl whose parents had deceased, and she had been sent to England at the age of thirteen for education, her relatives being English, but her mother a member of the Roman Catholic Church, and the daughter had been educated in that church and received confirmation and her first communion there. The courts of Italy, where the girl was born and educated until she came to England, had appointed guardians in that country, and there was an assurance given, at the time she was sent to England, by those who took charge of her and were appointed her guardians in chancery in England, that her religion was to be respected and not interfered with, which seemed not to have been fully * 450 carried * out; for she had been sent to Protestant schools
 1 and churches. The Italian courts now direct the guardians in that country to apply to the English Court of Chancery to have the former guardians discharged and others appointed, who would more conscientiously regard her religious training in the church of her parents. The petition was granted without hesitation.³

³ *Di Savini v. Lousada*, 18 W. R. 425, 426. The opinion of the learned Vice-Chancellor is of sufficient interest to justify repeating here. "This is to my mind a very clear case, and my duty is plain. There is an Italian young lady, who was a protégée of an English lady, who was a Roman Catholic. This lady's brother was a Protestant, but she herself lived and died a Roman Catholic; and the child was confirmed and received communion in that church, and is of an age which renders it undesirable to disturb her religious convictions. Her adoptive mother did in her lifetime express her wish that her brother should take charge of the child, and repeated that request in a sort of codicil to her will, hoping that her brother's wife would bring up the child with her own. On the lady's death the child, being at Florence, was placed under the jurisdiction of the Italian laws; and in pursuance of an order of the Pretor's Court, a council of guardians was appointed under judicial supervision. I am bound to respect that court and council, just as I should expect an Italian court to respect my own decrees. After the appointment of the guardians, and to give effect to the lady's desire, communications were made with the English brother, and these communications on the part of the Italian guardians stated that they had no right or power to affect the child's nationality, and they stipulated that the child's religion should be respected. On this point a positive engagement was given that it should not be prejudiced. That was done in terms absolutely binding, and it was not retracted by any subsequent proceedings. There was some misapprehension, for it seems the Italians wanted an undertaking that Lord Dundonald would respect the nationality of the child, that being something different from her religion. By that they must have meant that he should recognize the authority of the Italian guardians as continuing. Lord Dundonald in a letter which, I believe,

5. It seems now to be the settled rule of the Court of Chancery in England, that where, in the administration of funds in that court, as the guardian of infants, it becomes necessary to direct in what form of religion such wards shall be brought up, that court will, in the absence of all directions on the part of the father, direct the children to be educated in his faith, on the presumed ground that such was his intention and desire.⁴ But the court have sometimes hesitated to change the course of religious instruction to a child when there was reason to apprehend that it might produce such uncertainty and confusion in the mind of the child, as to prove perilous to its faith in any form of Christianity.⁵

6. But in a still later case⁶ the court upon mature consideration decreed the child, a daughter, nine years old when the controversy began, to be continued under the custody and instruction of the mother and her family, who were Protestants, notwithstanding the

reached its destination, refused to submit to this. There was nothing in this letter which in any way interfered with his pledge on the subject of religion, and there was nothing to alter the legal rights of the parties. Dr. Nobili could not derogate from the power of the Italian court, subject to this that nothing improper had been done by it. But very soon after the arrival of the child here, a question was raised between the Italian and the English guardians. The Italian guardians did not intend to abdicate in any way their power. Nothing has arisen to lead this court to say, 'We ought not to recognize the authority of the Italian court.' That court has directed Dr. Nobili to apply to this court to alter the circumstances in which the child is placed. The dissatisfaction has been expressed so early that I cannot say there has been any laches. I think that I am bound without exercising any judgment of my own to recognize their authority. They want me to place the child under the protection of two persons, Lady Lothian and Mr. Hope Scott. If I were myself dealing with it as a case of merely an English ward, I should be very dissatisfied with what has been done by Lord Dundonald in this case. I don't think it consistent with his undertaking, that he should have sent a child of that age to a school kept by a Protestant governess where she is taken to an English church every Sunday. It is not sufficient to say that no attempt has been made to proselytize her. I should, therefore, alter that state of things, and place her in the custody of persons of her own faith. As it is, I order her to be delivered into the custody of Lady Lothian and Mr. Hope Scott until further order, and I discharge the former order appointing guardians."

⁴ *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539.

⁵ *Stourton v. Stourton*, 8 DeG., M. & G. 760. See also *Austin v. Austin*, 34 Beav. 257.

⁶ *Andrews v. Satt*, L. R. 8 Ch. App. 622.

express direction of the father that the child should be brought up by his brother in the Roman Catholic faith, that being the religion of the father. The decision seems to have gone upon the ground, that the father, during his life, and the testamentary guardian afterwards, had so conducted, as to have impliedly given the mother of the child and the mother's friends to expect that they assented to it being educated in the Protestant faith and under the care of the mother's family, and that this, in connection with the resulting fact, that the child had become attached to her mother's family and knew nothing of her father's family, rendered it highly inexpedient to remove the child from her present place, and put her under new influences.

7. This case was first passed upon by the courts of law,⁷ where it was held that the testamentary guardian had the same right to the custody of his ward that the father would have, if living, to that of his child, and the court could not withhold the custody except until the validity of the guardianship should be tested.

8. The court of equity⁶ held, that a contract, between the father and mother, before and in contemplation of marriage, that the daughters should be brought up in the faith of the mother, is not a contract which a court of equity will specifically enforce. It will have weight in connection with other circumstances.⁸

⁷ In the Matter of Ellen Andrews, L. R. 8 Q. B. 153.

⁸ Lyons v. Blenkin, Jac. 245; Hill v. Hill, 10 W. R. 400. This is not the place to discuss the religious education of children, or the special duties of fathers in that respect, nor is the author disposed to intrude upon the sacredness of the topic. But as an apology for introducing some points of English equity law upon the subject, it may be proper to say, that in most Christian countries the father is held responsible that his children shall not be cast upon the world without suitable education. The same is true here, except that we do not regard religion as an important element in education. Reading, writing, spelling, and some other things, perhaps, are indispensable, but the knowledge of the New Testament is not only not required, but is held by many a positive defect. Hence, we apprehend, it would not be in the power of fathers, any more than of mothers, or other relatives, in this country, to secure for children any particular kind of religious training, except through the bequest of property and the appointment of guardians. We believe the probate courts, throughout the country, are administered by such judges and in such a spirit of decorum, that, with few, if any exceptions, they would religiously regard the wishes of both parents, in appointing guardians of such character as would meet the desires of the parents, where there was no insurmountable obstacle in the way; and that property in the power of

* SECTION IV.

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RESPONSIBILITY OF TRUSTEES, WHETHER SO IN FORM OR BY INTERMEDDLING, FOR THE ESTATE OF THOSE UNDER GUARDIANSHIP.

1. One who knowingly receives property of ward makes himself trustee for him during continuance of guardianship. Different cases enumerated where this will occur as to infants.
2. Where one is duly appointed to the office of guardian, and receives the estate of the ward as such, he is responsible to the same extent and in the same form as other testamentary trustees appointed by the probate court.
3. Responsibility of guardian for interest, and rate of compensation.
4. Unauthorized conversion of the estate by guardian, of no force.
5. Where the guardian makes unauthorized advances to the ward he will not be allowed to charge them in his account.
6. To what extent sales of real estate by guardians may be invalidated, as against *bonâ fide* purchasers.
7. Courts of equity will not, except under statutes, decree sale of the ward's real estate. Statutes impliedly prohibit sale otherwise.
8. The statutes must be strictly followed.
9. Courts of equity may charge reversionary property of infants with their maintenance.

§ 53. 1. FROM the very nature of the case, one who knowingly interferes with the estate of another not *sui juris* should be able to comprehend that he will acquire no rights as against the ward, by either express contract or presumptive acquiescence. Hence it was held in a recent Irish case,¹ that a person entering upon

such courts, for the benefit and education of children, would be administered in the same spirit ; and that for this end those courts would be glad to know the course of decision in that country from which we derive our laws.

¹ *Quinton v. Frith*, Ir. R. 2 Eq. 396. Mr. Schouler, Dom. Rel. 443, thus states the law upon this point : " A quasi guardianship often arises at law where there has been no appointment. . . . Any person who takes possession of an infant's property takes it in trust for the infant." And the person will be held to the same degree of responsibility as if he had been formally appointed to the office. *Pennington v. Fowler*, 3 Halst. Ch. 343 ; *Espey v. Lake*, 15 Eng. L. & Eq. 579. Chancery will, it is said in the last case, hold those persons standing in *loco parentis* to infants responsible for any estate of the infant's coming to their hands. So also guardians may be held responsible upon the same principle for any estate coming to their hands before their appointment. *Magruder v. Darnall*, 6 Gill, 269. But we apprehend this rule of accountability cannot be applied to statutory guardians, unless the property or its avails remained in the hands of the guardian at the time of his appointment. It is only in chancery that one who makes himself guardian of infants by intermeddling with their estate can be held accountable as trustee *de son tort*.

* 452 the * estate of an infant, whether the infant has been actually in possession or not, will be fixed with a fiduciary position as to the infant. 1st. Whenever he is the natural guardian of the infant. 2. When he is so connected by relationship or otherwise as to impose upon him the duty to protect, or at least not to prejudice, the infant's rights. 3. Where he takes possession with express notice or knowledge of the infant's rights. And one who accepts a conveyance of the infant's lands from his natural guardian, with the knowledge of his rights, will be held as the infant's bailiff during his minority.

2. Where one is duly appointed guardian of an infant or other person not sui juris, he will be liable to render an account of his administration before the probate court from which he received his appointment, and will be held liable to the same degree of responsibility for the preservation and disposition of the estate of his ward, as executors and administrators or other trustees.² In a somewhat recent case³ this point is discussed with reference to guardians, and it is said that they will be held responsible for corporate stocks, the property of their wards, at the price at which they were received by them, and if any of such stocks are disposed of by the guardians they must account for the full price received. And if the guardian has invested any of the ward's money in unproductive stocks it will be at his own risk. The ward is not bound to accept such investments upon coming of full age.

3. It is also here determined that the guardian is to be held responsible for six per cent interest on all moneys in his hands belonging to the ward, and to be allowed the same rate of interest upon all advancements made by him for the benefit of the ward; and to be allowed one per cent commission for all sums received or disbursed, as his compensation for services, that rule being established in that state.

4. Where the guardian of a female infant, upon the eve of, and in contemplation of marriage, invested her personal property in the purchase of real estate, with the consent of the ward * 453 and her intended * husband, and the marriage took place

² Ante, § 47.

³ *French v. Currier*, 47 N. H. 88. And one appointed guardian informally, or even where the appointment is wholly void, will be held responsible to the same extent as if regularly appointed, for all his doings under the appointment. *Earle v. Cowen*, 42 Miss. 105.

accordingly, and the ward deceased without issue, before arriving at full age, it was held by a divided court, that the act of the guardian in converting the personal estate into realty was not binding upon the ward, and that the property must still be regarded as personalty and the husband entitled to hold the same as against the collaterals of the wife.⁴

5. Where the guardian makes an advancement to the ward, in order to set him up in business, or for other purposes, without having the order of the court, it has been held that he will not be allowed to charge the same against the ward in the settlement of his account.⁵ But as a general rule, we apprehend, where the advancement was necessary for the education or establishment of the infant in life, and is for such an object as the court, on application, would have approved, the payment will be allowed in the settlement of the guardian's account. But if the act of the guardian was one which was not advantageous to the ward, or such as the court on application would have approved, the guardian cannot be allowed to charge the money thus paid, against his ward.⁶

6. In the sale of the real estate of the ward by the guardian, on the ground of the prior expenditure of the personalty, all that is required to give valid authority to the guardian to make the sale is, that the points involved should be passed upon by the proper tribunal. The *bonâ fide* purchaser will not be held responsible for the application of the purchase-money, or for the prior mis-

⁴ Davis's Appeal, 60 Penn. St. 118.

⁵ Shaw v. Coble, 63 N. C. 377. As to the extent of the responsibility of the guardian for the estate of his ward, see Hurdle v. Leath, 63 N. C. 597, citing Boyett v. Hurst, 1 Jones, Eq. 167. In Bannister v. Bannister, 44 Vt. 624, it was held not competent for the statutory guardian of the estate of an infant to use the estate for the purchase of the infant's time of his father until he came of age. The guardian must at least show that the ward suffered no loss by the purchase.

⁶ Milner v. Lord Harewood, 18 Ves. 259. The general duties of the guardian being faithful administration in securing, protecting, and disbursing the effects of his ward, it will scarcely be required that we enter into any detail in regard to the particular course to be pursued by him. That will become sufficiently obvious as the several queries arise. He is to do what competent and faithful men do in the management of their own affairs. Genet v. Tallmadge, 1 Johns. Ch. 3, where it was held a legacy was properly paid to the father of an infant after he had been appointed guardian, and had given bonds to account before the probate court for all moneys received for the ward.

conduct of the guardian in misapplying the property of his ward.⁷

* 454 * 7. The general rules applicable to the sale of real estate by executors and administrators⁸ will apply to the case of guardians. It may be stated as the general, well-settled rule in courts of equity, that they have not felt justified in directing the sale of the ward's real estate, either in the case of infants or others. This general proposition will be found laid down in a considerable number of cases, both English and American.⁹ There is another very conclusive argument in this country, against courts of equity decreeing the sale of the real estate of infants and others under guardianship, that the statutes in most of the states have made special provision for effecting such sales in certain emergencies and under certain prescribed formalities. This being so, there is of course always an implied prohibition against accomplishing the same thing in any other mode.

8. We need not attempt to specify even the general requisites to the validity of such a sale. It will be sufficient, in addition to what we have already said in regard to such sales by executors and administrators,⁸ that we caution both guardians and purchasers against omitting any of the statutory requirements for making such sales. In some cases where the guardian acts under a power contained in the devise or deed conveying the title to the infant, courts of equity will help out a defective execution of the power where there has not been any omission of the substantial requirements.¹⁰ But it would not, of course, be safe to rely upon any such exceptional relief, even in cases of testamentary and other powers, and that rule in equity could not be extended to supply any defects in a statutory power.

9. Courts of equity have power to charge reversionary property of infants with money required for their maintenance, even where some of the infants, for whose benefit the money is raised, may not ultimately become entitled, in possession, to the property

⁷ *Mulford v. Stalzenback*, 46 Ill. 303. The same rule named in the text will be applied to sales of real estate by administrators. *Myer v. McDougal*, 47 Ill. 278.

⁸ Ante, § 17.

⁹ *Taylor v. Phillips*, 2 Ves. Sen. 23; *Ware v. Polhill*, 11 Ves. 278; *Ex parte Phillips*, 19 id. 122; *Schouler*, Dom. Rel. 488.

¹⁰ 1 Story, Eq. Jur. §§ 169, 170 b, 172.

charged. A security for this purpose was approved, with a provision for restoring the money by means of an insurance against the contingency.¹¹ So also to charge freehold estates of the infant with the expense of past maintenance.¹²

SECTION V.

OTHER INCIDENTS OF THE OFFICE OF GUARDIAN.

1. The guardian has the same right to recover the property of the ward, either real or personal, which any general owner has.
2. He may recover choses in action, but commonly in name of ward.
3. He may compromise disputed claims, either in favor of or against his ward, or submit them to arbitration.
- * 4. Has no power to bind either the person or estate of the ward, except for * 455 necessities and the protection of his interests. Discussion of the extent of the word "necessaries," and of the power and duties of the guardian in procuring them.

§ 54. 1. THOSE law writers who have treated the subject more in detail than would be consistent with the scope of this work, have attempted to define the powers and duties of guardians more minutely and to give the exact limits of each. It is unquestionably within the power of the general guardian both of the person and property of his ward to recover all his property, whether in possession or in action, and to exercise the same dominion over it which all general owners do over their property. For this purpose he may bring an action either of ejectment or replevin, as the property may be either real or personal, and may thus recover the possession of any real or personal estate which may be withheld from the ward or his guardian; and in such cases he may in general count upon his own right to immediate possession, which the law regards as actual possession, by force of a fictitious presumption, that that is already done, which ought in law to be done.¹

2. The same rule will apply to choses in action. The guardian may sue thereon, but generally in the name of the ward, and

¹¹ De Witte *v.* Palin, L. R. 14 Eq. 251.

¹² Howarth in re, L. R. 8 Ch. App. 415.

¹ Ante, § 27, and cases cited. 1 Chit. Pl. 290, n. (1); Harg. Co. Litt. 1, 2, n. 220; Stewart *v.* Crabbin's Guardian, 6 Munf. 280; Thomas *v.* Bennett, 56 Barb. 197; Almy *v.* Crapo, 100 Mass. 218.

always so where the right of action rests merely in contract. But where the claim consists in a right of action against a tort-feasor for injury to, or the conversion of personal property in possession, it is optional with the guardian, as with all owners of property in similar circumstances, so long as the property still remains in the possession of the wrong-doer in specie, to sue for damages for the wrongful act, in the name of the ward, if committed before his appointment as guardian, and in his own name if done since, or to bring replevin for the restoration of the property in specie and damages for its detention.²

3. The guardian may also, within reasonable limits, compromise disputed claims against the ward, or in his favor against others, and by parity of reason he may refer the same to arbitration³ and the * ward will be bound by the award, the same as in submissions by persons sui juris. But where the submission contains special stipulations, beyond the scope of ordinary submissions, it will not commonly bind the ward, but may bind the guardian.⁴

4. The guardian has no power to bind, either the estate or the person of his ward, beyond the exigencies of his office; and that will ordinarily be considered as limited to the procuring necessary support and education for such ward, and to the protection of his property and person. What shall come precisely within these exigencies must depend upon general principles of law, applicable to all cases of this character, to be declared by the court, and the peculiar and distinguishing facts pertaining to each particular case, to be judged of by jury, or the triers of fact in such case. The general rules of law governing all cases are that the guardian shall procure proper food and clothing for his ward, and the opportunity to acquire the elements of practical education, both secular

² Ante, § 27, and cases cited.

³ Caldwell on Arbit. 24; Weed v. Ellis, 3 Caines, 253; Hutchins v. Johnson, 12 Conn. 376; Weston v. Stuart, 2 Fairf. 326. But it has been held that a guardian ad litem, whose authority *ex vi termini* will naturally be restricted to the prosecution of the suit in which he is appointed, has no authority to submit the same to arbitration even by reference under rule of court. Hannum v. Wallace, 9 Humph. 129; Fort v. Battle, 13 Sm. & M. 133. But we should have supposed that a reference under a rule of court might have been regarded as one of the modes of prosecution coming fairly within the powers of a guardian ad litem.

⁴ Caldwell, 327; Bristow v. Binns, 3 Dowl. & Ry. 184.

and religious, so long as his estate or the earnings of the ward will warrant it. Beyond this must depend upon the extent of his property and his reasonable expectations in life, with reference to which the ward may expect his guardian will afford him the opportunities of education and instruction. Every ward who has the means of subsistence, without manual labor, has the right to have that means applied, to a reasonable extent, in procuring him indispensable support and education. Beyond this the guardian would not be expected, ordinarily, perhaps, to expend more than the income of the estate in procuring that extent of instruction which is merely ornamental, and which comes more especially within the range of the elegant arts, or the higher studies connected with education, which may tend to gratify the taste or the laudable ambition of the ward, but which do not, in any sensible degree, qualify him for the essential duties of life. And if the estate of the ward is very large, the guardian would not be expected to expend all the income, probably, for the mere purposes of the indulgence of the ward, or in vain attempts to accomplish such attainments as were * not within the compass of his capacity. The * 457 guardian is to exercise a reasonable discretion in this as in all other respects; and while he denies his ward no reasonable indulgence, which is consistent with the extent of his fortune and fairly within the range of reasonable support and education, according to his just expectations in life, he is at the same time to hold such a firm and steady hand over all the expenditures, for the benefit of his ward, as will commend itself to the approbation of a prudent and just judge, who may be called to examine and adjust his accounts; and will not leave the ward, when he comes to control his own affairs, to entertain sorrow or regret that he had not fallen under a more discreet and prudent guardianship.

5. The guardian will be allowed for needful expenditures in support of his ward, although his property may be in unproductive lands, or other property yielding no income.⁵ Those who have supplied the ward with necessities, with the approbation of the guardian, may recover their value of the ward after the guardianship ceases.⁶

⁵ *Jarret v. Andrews*, 7 Bush, 311.

⁶ *Giquel v. Daigre*, 22 La. Ann. 137.

SECTION VI.

THE TERMINATION OF THE GUARDIANSHIP, AND SETTLEMENT OF THE GUARDIAN'S ACCOUNT.

1. That will occur by death, coming of age, marriage, &c.
2. It may occur by resignation or removal, &c.
- 2 a. Grounds of removal. Must be serious and substantial.
3. In the case of persons of unsound mind, it will result from the ward being restored.
4. Whenever the relation terminates, for any cause, the guardian's account must be rendered.
5. Securities taken for the ward's estate become part of the trust fund.

§ 55. 1. THE termination of guardianship must depend somewhat upon the particular species. In all kinds, however, the relation must cease upon the death of either the guardian or the ward, since it is of so strictly personal a character that it must terminate with the joint lives of the two. And in the case of infants, guardianship will of course cease upon the infant arriving at full age. It may also terminate, in the case of an infant female ward, by her marriage, since the husband has always the superior right to control both the person and estate of his wife, being himself of full age, and if not it is considered that *his* guardian will have the same control over the *wife's* estate, which would have fallen to the husband had he been of full age. But the marriage of a male ward, being an infant, does not affect the control of the husband over his estate.¹

¹ *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103. See Schouler, Dom. Rel., and cases cited. In this case the Lord Chancellor, *Macclesfield*, discusses the doctrine of the English chancery in regard to the marriage of infant wards in chancery, without the consent of the guardian and the Court of Chancery, very much at length. It seems that the guardian is required to enter into recognizance not to marry the ward, being an infant, either male or female, without the direction of the Court of Chancery. This is deemed important with female wards in order to secure a proper settlement in advance of the marriage for the proper establishment in life and maintenance of the ward and any offspring of the contemplated marriage; and where the marriage takes place without consulting the court, the guardian's recognizance is forfeited, and the court may punish, as for contempt, all parties concerned in bringing about the marriage; and in extreme cases the marriage has been declared void by subsequent act of parliament. In the case of male wards, the action

* 2. So too every species of guardianship may be terminated by the resignation of the office and the confirmation of such resignation by the court making the appointment. And in regard to the right of the court to accept such resignation there can be no question, even in the absence of all statutory provision upon the subject. Since the fact of the resignation is in itself more or less evidence of unfitness, or, what is the same, unwillingness to serve, and might be treated as sufficient reason for vacating the appointment,² which power appertains to all courts, upon general principles of the right to revise and reconsider their judgments and decrees. So too the guardianship may in all cases terminate by the removal of the guardian, by the court making the appointment, whether for good cause or not, unless where the statute defines the ground of removal, and the cause assigned in the decree of removal does not come within the statute. In such case the judgment might be held void on its face, it being a special and limited jurisdiction, and the cause not coming within such jurisdiction; but in all other cases the decree of removal will be valid, and operate to terminate the relation.

2 a. The grounds of removal of guardians are so various, that we could scarcely be expected to go much into detail. They will be suggested by similar considerations with those which must decide the fitness of candidates, when such appointments are to be made. It would not be required to show an entire incapacity in the guardian, but such a degree of unfitness as to render the further continuance of the relation improper, or undesirable, to a serious and essential extent. Mere whim, or caprice, or choice, either in the ward or the friends, will not be sufficient cause of removal. The objection must rest upon substantial grounds of unfitness in the guardian. In one recent case,³ it was held, that the conduct of the guardian, tending to alienate the affections of his infant ward from its mother, who was a person of good character, was a sufficient ground for his removal.

of the court is important in preventing a marriage being got up clandestinely, and without the knowledge of those near relatives who may consider themselves interested in securing a suitable alliance and an equal fortune and social position on the part of the wife to that of the husband. But these considerations have but slight weight in this country.

² Schouler, Dom. Rel. 428. See also *Young v. Lorain*, 11 Ill. 625; *Pepper v. Stone*, 10 Vt. 427.

³ *Perkins v. Finnegan*, 105 Mass. 501.

3. And in the case of persons of unsound mind, the guardianship will practically terminate with the recovery by the ward of his sound mind and disposing capacity. But it is regarded, in practice, as the only regular course for the court, on application by any party interested and notice to all others in interest, * 459 to declare *the guardianship terminated by the occasion for its continuance having ceased. The same rules will apply to cases of guardianship over spendthrifts. But in the latter class of guardianships there will be a special propriety and necessity for application to the court to determine the proper time for its termination. The causes for removal of guardians of different classes need not be particularly examined here, since they are mostly of a statutory character, and differ somewhat in the different states, and the discussion of the cases would occupy more space than we could fairly devote to the subject, in a general work of this kind. In general it may be said that where the appointment was improvidently made, or the guardian, for any cause, has proved incompetent or unsuitable, in any respect, either of capacity or acceptableness to the ward, it will be the duty of the court to remove him, and by a new appointment seek to remedy the evil.

4. Whenever, for any cause or in any mode, the guardianship has been terminated, it will be the duty of the guardian, if living, and, if not, of his personal representative, to render an account of his guardianship before the court from which he received the appointment, which will more commonly be the Court of Probate.⁴ We need not enter into any detail of the grounds upon which this account is to be rendered, or the extent of responsibility involved in it. They will be very nearly the same which obtain in the case of accounts rendered by executors and administrators, which we have already considered.⁵ And where any trustee of a continuing trust renders his account, from time to time, and his mode of applying the fund thus becomes known to those interested in the same, either beneficially or adversely, and no objection is made for a long course of years, it will exonerate the trustee from being called to apply it in a different manner, although a court of equity will so direct as to the future.⁶

⁴ 1 Bl. Comm. 462, 463. In chancery the guardian might be called to account at any time before the termination of his guardianship, by any friend of the ward. *Eyre v. Shaftsbury*, 2 P. Wms. 103, 119.

⁵ Ante, § 48, and cases cited.

⁶ *Amory v. Lowell*, 104 Mass. 265.]

5. The securities taken by the guardian for loans of the money of the ward become part of the fund in his hands, and are so impressed with a trust for his benefit, that they cannot be divested of such trust except by the clearly expressed consent of the ward after he comes of age, or is released from guardianship, or by such consent of a future guardian.⁷

⁷ *Burgess v. Keyes*, 108 Mass. 43.

THE LAW OF TESTAMENTARY TRUSTS,
EMBRACING ALL TRUSTS GROWING OUT OF THE SET-
TLEMENT OF ESTATES, AND FOR THE BENEFIT OF
THOSE DERIVING PROPERTY THEREFROM.

THE LAW OF TESTAMENTARY TRUSTS,

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CHAPTER XIX.

THE DUTIES PERTAINING TO THE OFFICE OF TRUSTEE, WHETHER EXECUTOR, ADMINISTRATOR, GUARDIAN, OR BY WHATEVER NAME.

INTRODUCTION.

1. Definition of trusts in the simplest form.
2. The courts of equity invented the remedy of subpoena against trustees.
3. Trusts first called uses. Lord Coke's definition.
4. The statute of uses transferred the title to the use.
5. The courts have since invented trusts to take the place of uses.
6. The doctrine of trusts thus initiated has become extensively useful.
7. Particular definition of testamentary trusts.

§ 56. 1. THE history of the origin and growth of the doctrines and principles of trust is not of much practical importance either to the student or the practitioner. A trust in the first instance seems to have been nothing more than a confidence between one person and another, that the property delivered would be kept for the use and benefit of the owner, in the first instance, or secondly, of any other he might name as the ultimate beneficiary. And it did not seem to be considered, at a very early day, that the cestui que trust had any legal redress against the trustees, for any breach of confidence in not fully answering his just expectations in regard to the use of the thing confided to him,¹ by the donor or founder of the trust.

2. But in process of time, in their efforts to find some remedy for all wrongs, the courts felt it incumbent upon them to call the trustee into the courts of equity to answer upon his oath for any

¹ Lewin, 1.

alleged breach of the confidence reposed in him. This is said to have first occurred during the reign of Richard the Second, by the ingenuity of the Lord Keeper, John Waltham, Bishop of Salisbury, who originated the writ of subpoena, "by which the trustee was liable to be summoned into chancery, and compellable to answer upon oath the allegations of his cestui que trust."²

3. The trust was first called a use, and was defined to be "a confidence not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land scilicet, that the cestui que use should take the profit, and that the terre-tenant should execute an estate as he should direct."³

4. But as these uses, growing out of land and being held by different persons from those in whom the bare legal title of the estate existed, were in practice found to lead to many inconvenient results, and to be resorted to for many purposes of fraud or evasion, the legislature interfered to remedy the evils by what has been called the Statute of Uses,⁴ which provided, that "where any person stood seized of any hereditaments to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful seisin of the hereditaments in such like estates as they had in use, trust, or confidence." The effect of this statute was to merge the estate in the use and to transfer both to owner of the use. But this statute did not affect special trusts, that is, trusts where the trustee held the legal title for some special purpose or object.⁵ The reason assigned for this was that the trustee held both the legal estate and the use.⁶

5. As growing out of the construction of the statute of uses, the courts were enabled to build up a new system of interests and estates, which they denominated Trusts, thus presenting three species of interest in land, which Lord *Hardwicke* thus characterizes.⁷ "Interests in land thus became of three kinds: first, *the estate in the land itself*, the ancient common-law fee; secondly, the *use*, which was originally a creature of equity, but since the statute of uses it drew the estate in the land to it, so that they were

² Lewin, 1.

³ Co. Litt. 272 b.

⁴ 27 Hen. 8, c. 10.

⁵ 4 Kent, Comm. 302.

⁶ Lewin, 6.

⁷ Willet v. Sandford, 1 Ves. Sen. 186; Coryton v. Helyar, 2 Cox, 342.

joined and made one legal estate; and thirdly, the *trust*, of which the common law takes no notice, but which carries the beneficial interest and profit in a court of equity, and is still a creature of that court, as the use was before the statute."

6. This is a remarkable instance of the force of words and names in keeping up distinctions in the law, when there is, in fact, no substantial difference in the thing signified. For although modern trusts are in all respects the same thing as the ancient uses, which the statute of uses annihilated by transferring the estate to the use, the trust, which the courts immediately invented to take the place of the use, has never been interfered with, and has been found extremely serviceable in many respects,⁸ which we shall now attempt to define and explain more in detail.

7. We shall in the following chapter attempt to give such a condensed view of the law of trusts, as to afford a safe guide to all the different classes of trustees connected with the settlement of estates. This will embrace in some sense the general law of trusts, since the duties and responsibilities of trustees will be the same, whether appointed by deed or will, or in whatever mode, even by naked oral commission and without any formal acceptance, except that which results from the creation of a mutual confidence in any mode between the owner of property and the person or persons to whose care he commits it, either during life or after his decease, that such person or persons will use it in the mode pointed out by the owner. But we shall confine ourselves as far as practicable to those questions likely to arise, either in the course of the settlement of estates or in the custody of property derived from such settlement, and to be kept and administered for the maintenance, education, and advantage of the beneficiaries under such estates.

⁸ Lord *Hardwicke*, in *Hopkins v. Hopkins*, 1 Atk. 581, 591; *Jackson v. Cary*, 16 Johns. 302. In *Burgess v. Wheate*, 1 W. Bl. 160, Lord *Mansfield* said, "In my apprehension, trusts were not on a true foundation till Lord *Nottingham* held the great seal. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief which the statute of Henry VIII. meant to avoid."

It was said in the same case by Lord Keeper *Henly*, that there was no difference in the principles between the modern trust and the ancient use, though there was a wide difference in the application of these principles. "The difference consists," says Chancellor *Kent*, 4 Comm. 303, "in a more liberal construction of them, and at the same time a more guarded care against abuse."

SECTION I.

HOW FAR THE TRUSTEE IS PRECLUDED FROM RENOUNCING THE TRUST AFTER HAVING ACCEPTED.

1. He must renounce in toto, or he will be held responsible throughout.
2. Trustee paying penalty of bond for faithful administration will not excuse him from liability to account as trustee.

§ 57. 1. It is laid down as a general rule, and seems to have no exceptions, that the trustee having once accepted the trust, either expressly or by fair implication, cannot afterwards exonerate himself from responsibility by a resignation or renunciation of the office.¹ This case is where one named an executor in the will acts on behalf of particular legatees, disclaiming an intention of acting generally. He afterwards renounces formally in favor of another who was named trustee in the will, and who thereupon obtains administration with the will annexed, and possesses himself of the assets and dies insolvent. It was held that the executor was liable for the goods, and for faithful administration notwithstanding his renunciation. And it was here considered that the executor had control of the assets, and that the administrator with the will annexed obtained possession of the assets through his means. Lord *Redesdale*, Chancellor, said,² "Executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the effects themselves, or by putting the administration into the hands of a court of equity." His lordship said he regarded the administrator as much the agent of the executors "as if they had given him a power of attorney."

2. It was held in an early case that where the trustee gave a bond for faithful administration, and to convey the trust estate according to the direction of the cestui que trust or his executor, and subsequently refused to do so, for which refusal he was compelled to pay the full penalty of his bond; that the cestui que trust or his personal representative might still maintain a bill in

¹ *Doyle v. Blake*, 2 Sch. & Lef. 229.

² *Id.* 244. See also *Lowry v. Fulton*, 9 Sim. 123.

equity to compel the trustee to convey the estate and account for the profits, but deducting the amount paid upon the bond and interest.³

SECTION II.

THE TRUSTEE CANNOT DEVOLVE HIS DUTIES UPON OTHERS.

1. The trustee cannot delegate his office and duty, and is responsible for the acts of all subordinates and assistants.
2. Some apparent exceptions to the foregoing rule.
3. Where trustee signs, or intrusts acts to others, from necessity.
4. But trustee who signs is *primâ facie* responsible.
5. Effect of joining where not compelled, and of conniving at waste.
6. How far joint executors differ from joint trustees.
7. Duty of trustee to take active means to restrain waste of co-trustee.
8. Effect of indemnity clauses in deeds of settlement.
9. Upon the death of one or more of joint trustees, the office devolves upon the survivors.
10. Mode of supplying new trustees.

§ 58. 1. It results from the very nature of the office of a trustee, that it cannot be delegated to others, being of a strictly personal and fiduciary character.¹ So that the trustee is himself responsible for the faithful conduct and competency of all his subordinates and assistants, whether strangers, attorneys, or contractors, or co-executors.² The case of *Balchen v. Scott*³ has sometimes been regarded as an exception to the foregoing proposition. But it was decided upon the ground that the defendant in transmitting the bill to his co-executor did not act officially, and was therefore no more responsible than any other person doing the same. But that

³ *Moorecroft v. Dowding*, 2 P. Wms. 314.

¹ *Turner v. Corney*, 5 Beav. 517. But where the legal title of the trust estate is conveyed by the trustee to another, who knows of the trust, or when such other person acquires title to the trust estate in any manner, with knowledge of the trust, he holds the property subject to the trust, and may be compelled in equity to so apply it. *Ryan v. Doyle*, 31 Iowa, 53; *Smith v. Walser*, 49 Mo. 250. And when the trust appears on the face of the transfer, the purchaser must take notice of it, at his peril. *Jaudon v. Nat. City Bank*, 8 Blatch. C. C. 430.

² *Lewin*, 204, 205, and cases cited; *Chambers v. Minchin*, 7 Vesey, 196; *Langford v. Gascoyne*, 11 Vesey, 333.

³ 2 Ves. Jr. 678.

could not be regarded as a sound view of the law at the present day.⁴ And *Churchill v. Hobson*,⁵ where one executor paid £500 into the hands of the other, who misapplied the same, and the former was held not responsible, went upon the special ground, that the co-executor, who received the money and misapplied it, was the banker of the testator, who had kept all his money for him, and the court thought that the executor paying over the money to such banker was not to be held to any greater degree of care and diligence than the testator had himself exercised. Neither of these cases have any bearing upon the general duty of co-executors and co-trustees. They are always held responsible for the defaults of each other so far as they have, to any extent, a joint custody of the assets.⁶

2. But to the rule laid down in the preceding section, there are some apparent exceptions. Thus it is said in *Doyle v. Blake*,⁷ if the executors collect the money and deposit it with one of their number in obedience to the express directions of the will, although this might not excuse them, if the money were lost thereby, as to creditors whose claim to payment is above and altogether independent of the will, it certainly would be a defence to any claim on the part of legatees, whose rights are exclusively dependent upon the will. So, also, where an executor who is employed by his co-executor as his agent to sell an estate, which, under the will, the co-executor had power to sell, hands over the price of the estate to his co-executor, he is not accountable for the misapplication of the money by the co-executor, because he had no legal right to retain it, although by the terms of the will the avails of the sale were to be considered part of the personal estate.⁸ This case is decided expressly upon the ground that, under the special circumstances, the executor had no right to retain the money against his co-executor, not having acted as executor in making the sale, but as agent merely.

3. There are some cases where the executor or trustee is compelled by a practical necessity to intrust the transaction of his official business to others, that he will not be held responsible for their defaults. Thus it is held that where two or more executors

⁴ Lewin, 204, 205, and cases cited.

⁵ 1 P. Wms. 241.

⁶ Ante, § 8, pl. 5, n. 16.

⁷ 2 Sch. & Lef. 230, 239, 240.

⁸ *Davis v. Spurling*, 1 Russ. & My. 64 ; s. c. Taml. 199.

join in a receipt for money paid the estate, but one only actually receives the money, and misapplies it, all shall be held responsible for the default, because there was no necessity for all to join; but if joint trustees unite in a receipt under similar circumstances, the trustee who does not receive the money will not be held responsible for the default of his co-trustee, because there was a necessity in that case for all the trustees to unite in the receipt, in order to give legal effect to the act.⁹ Lord *Redesdale*, Chancellor, here says, "The distinction seems to be this, with respect to the mere signing, that if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge, and the true question in all these cases¹⁰ seems to have been, whether the money was under the control of both executors." Lord *Hardwicke*, in one case,¹¹ goes into some detail, in explaining the different kinds of necessity, which will excuse the trustee in assenting to the act of his co-trustee, or of other agents or assistants. His lordship said: "Where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses. There are two sorts of necessities: first, legal necessity; second, moral necessity." Legal necessity is where one is compelled to act in order to meet the requirements of the law, as in the case of trustees. "Moral necessity, from the usage of mankind. . . . If the trustee appoints rents to be paid to a banker at the time in credit, and the banker afterwards breaks, the trustee is not answerable." "So in the employment of stewards and agents; the receiver of Lord Plymouth's estate took bills, in the country, of persons who, at the time, were reputed of credit and substance, in order to return the rents to London; the bills were protested and the money lost, and yet the steward was excused. None of these cases are on account of necessity, but because the persons acted in the usual method of business." And the same

⁹ *Joy v. Campbell*, 1 Sch. & Lef. 328, 341.

¹⁰ *Sadler v. Hobbs*, 2 Br. C. C. 114; *Scurfield v. Howes*, 3 id. 91. See also *Hovey v. Blakeman*, 4 Vesey, 596; *Bacon v. Bacon*, 5 Vesey, 331; *Chambers v. Minchin*, 7 id. 186.

¹¹ *Ex parte Belchier*, Amb. 218, 219.

rule is adopted in later cases,¹² where an assignee in bankruptcy signed dividend checks on the bankers and delivered them to his co-assignee to sign and draw the money, and he, after signing them, left them in his desk, from which they were stolen, and paid at the bank, he was not held responsible, on the ground that what he did was but an act of necessity, to enable the co-assignee to draw the money.¹³

4. But the burden of proof is upon the trustee who signs a receipt for money, to enable his co-trustee to obtain it, where the same is not applied to the purposes of the trust, to show that he did not receive the money, or in any way assent to, or connive at its misapplication.¹⁴ Lord *Eldon*, Chancellor, here said: "At law, where trustees join in a receipt, *primâ facie*, all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him to show, that the money acknowledged to have been received by all, was in fact received by one, and the other joined only for conformity." And his lordship proceeds to point out and approve of the distinction between the case of trustees and executors in this respect.¹⁵ But as said by Lord Keeper *Cowper*:¹⁶ "It may be reasonable, where it cannot be distinguished how much was received by the one trustee, and how much by the other, to charge each with the whole."

5. And although the trustee may excuse himself from responsibility for the waste of his co-trustee, in the manner stated in the preceding sections, he will, nevertheless, be held responsible, where the sale upon which the money was raised was unnecessary, or he permitted the co-trustee to retain the money beyond the necessities of the trust, or to conduct with it in a manner not required by it.¹⁷ Here the co-trustee, with the knowledge of his associate, kept and loaned the money for ten years, and the court held the associate responsible for not sooner restoring the money to the purposes of the trust.¹⁸

¹² *Bacon v. Bacon*, supra; *Joy v. Campbell*, supra.

¹³ *Ex parte Griffin*, 2 Gl. & J. 114.

¹⁴ *Brice v. Stokes*, 11 Vesey, 319, 324.

¹⁵ See *Westley v. Clarke*, 1 Eden, 359; *Harden v. Parsons*, id. 147.

¹⁶ *Fellows v. Mitchell*, 1 P. Wms. 81, 83.

¹⁷ *Brice v. Stokes*, 11 Vesey, 319; *Walker v. Symonds*, 3 Swanst. 1, 41, 74.

¹⁸ See *Styles v. Guy*, 1 Macn. & Gord. 422.

6. There are some cases which hold that even in the case of joint executors, a joint receipt for money is not conclusive of the fact that the money came to the hands of both.¹⁹ Lord *Northington*, Chancellor, here said: "If it appears plainly that one executor only received and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to contest the act of their co-executor, either before or after the act was done, what grounds has any court in conscience to charge him?" And Lord *Eldon* said, in one case,²⁰ "but now joining alone [in the receipt] does not impose responsibility." But in another case²¹ his lordship said: "Perhaps it may be reasonably doubted whether these decisions, which have broken down a very intelligible rule, leaving every case to be determined upon its own circumstances, are very wise." The rule is thus stated by us in an early case:²² "One executor is not liable for the devastavit of another joint executor, where he never had the control or possession of the funds. But if both take possession of the goods jointly, or if one, having possession of the goods, suffer them to go into the hands of another executor, who squanders them, both are liable for the waste." And Lord *Redesdale* said, in *Joy v. Campbell*:²³ "The true question in all these cases seems to have been, whether the money was under the control of both executors." And it seems to be entirely well settled, that if an executor join in any act which is necessary to enable the co-executors to obtain possession of the funds belonging to the estate, he will be held responsible for the misapplication of the same by those into whose hands he consented to deliver them.²⁴ This will extend to the act of drawing,²⁴ or indorsing a bill,²⁵ or any similar act.²⁶ And joint administrators stand upon the same footing with joint executors.²⁷

7. We have before sufficiently intimated the duty of all who

¹⁹ *Westley v. Clarke*, 1 Eden, 357.

²⁰ *Walker v. Symonds*, 3 Swanst. 64.

²¹ *Shipbrook v. Hinchinbrook*, 16 Vesey, 479.

²² *Sparhawk v. Admr. of Buel*, 9 Vt. 41. But where there was no reason to consider it unsafe in the hands of the joint executor, it has been held the rule is otherwise. *Robinson's Estate*, 7 Phil. Repts. 61.

²³ 1 Sch. & Lef. 341.

²⁴ *Sadler v. Hobbs*, 2 Br. C. C. 114.

²⁵ *Hovey v. Blakeman*, 4 Vesey, 608.

²⁶ *Lewin*, 222.

²⁷ *Willand v. Penn*, cited in *Jacomb v. Harwood*, 2 Ves. Sen. 267.

stand in a fiduciary relation towards others, to be watchful, not only to avoid all loss or depreciation of the trust fund, so far as themselves are concerned; but also to be equally watchful of the conduct of their associates, over which they have any means of exercising control. For in the words of Mr. *Lewin*,²⁸ "A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction,²⁹ and, if a breach of trust has been already committed, to file a bill for the restoration of the trust fund to its proper condition;³⁰ or, at least, to take such active measures as, with a due regard to all the circumstances of the case, may be considered the most prudential."³¹

8. It seems to be now settled in England, both by the decisions and by act of parliament, that the indemnity clause inserted in trust deeds, that one trustee shall not be held responsible for any act or default of the co-trustee, is of no avail, by way of defence, since it is only the expression of the principle of equity law applicable to the case, without any such express declaration.³² But the deed of settlement may be made so special as to excuse one trustee from all duty of watchfulness over the conduct of co-trustees, and only hold each responsible for his own acts or defaults, thus making the duty several, and not properly joint.³³

9. We have already sufficiently intimated, that the office of co-trustees is so far joint and entire in its nature, that upon the decease of one or more of the trustees, the office will devolve upon the survivors.³⁴ And the survivors, in such case, will have the same power and authority in all respects as the whole number had at first.³⁵

10. Where the donee of the power to appoint new trustees becomes insane, the court of chancery have power to appoint them.³⁶ In general, it may be said, that new trustees, either to supply the place of others, or where none before existed, must be

²⁸ *Trusts*, 224, 225.

²⁹ *In re Chertsey Market*, 6 Price, 279.

³⁰ *Franco v. Franco*, 3 Vesey, 75; *Powlet v. Herbert*, 1 Ves. Jr. 297.

³¹ See *Walker v. Symonds*, 3 Swanst. 71.

³² *Nonall v. Harford*, 8 Vesey, 8; 22 & 23 Vict. c. 35, § 31; *Lewin*, 225.

³³ *Wilkins v. Hogg*, 3 Giff. 116; s. c. 10 W. R. 47; *Lewin*, 226.

³⁴ *Lewin*, 212; *Co. Litt.* 113 a, 181 b; *Attorney-General v. Gleg*, Amb. 584.

³⁵ *Warburton v. Sandys*, 14 Sim. 622.

³⁶ *Re Sparrows' Trusts*, 18 W. R. 1065; s. c. affirmed, id. 1185; 5 L. R. Ch. App. 662; *Re Heaphy's Trusts*, id. 1070.

appointed by the court of equity having the appropriate jurisdiction, unless the instrument creating the trust provides the mode of supplying trustees, when that must be followed. And it has been held that, where a want of trustees occurs, the court of equity may carry forward the trust, if more convenient, through its own officers and agents.³⁷

SECTION III.

THE TRUSTEE CANNOT PROFIT BY THE TRUST ESTATE.

- 1 and n. 1. The general rule stated.
2. Cases and instances illustrating it.
3. The rule of law in regard to compensation.
4. The responsibility of trustees in this country.
5. Trustees responsible for profits made by use of trust money. May be followed.
6. The same rule obtains where partnerships continued.
7. One trustee has no power to divert trust funds from co-trustee.
8. Trustee cannot purchase trust property, or charge for professional services.
9. Duty of trustees to keep securities alive. Policies of insurance.
10. New trustees must look after the fund in the hands of former trustees.
11. Trustees responsible for acts of agents, &c.
12. May not mix trust funds with his own.
13. Trustee may accept additional shares assigned trust estate.

§ 59. 1. WE have already adverted, incidentally, to the subject of this section, in connection with the duty of executors and administrators, in the management and disposition of the assets of the estate of the decedent.¹ We need scarcely say more here, than to state the general rule of law, which pervades the entire topic now under discussion, that neither in buying, selling, or using

³⁷ *Batesville Institute v. Kauffman*, 18 Wall. 120.

¹ Ante, § 48, *passim*. In one case, *O'Herlighy v. Hedges*, 1 Sch. & Lef. 123, 126, Lord *Redesdale*, Chancellor, said: "The rule in equity, that a trustee shall gain no benefit to himself by any act done by him as trustee, but that all his acts shall be for the benefit of the cestui que trust . . . is established in order to keep trustees in the line of their duty." And this general proposition is maintained or claimed to be in an almost endless number of cases. The illustrations are very various. Thus, if the executor or trustee buy up debts against the estate, or incumbrances upon it, at a discount, this will inure for the benefit of the estate, and the executor or trustee can only charge the estate the amount actually paid by him. Lord *Eldon*, Chancellor, in *Lacey ex parte*, 6 Vesey, 625, 628; post, § 140.

the trust estate, can the trustee make any profit, or derive any pecuniary advantage to himself. His time and talent and all the accidents and successes of business, must be turned solely, and exclusively, to the advantage of the cestui que trust. The detail of the more recent English decisions will show this very fully. Thus if the trustee buy up an incumbrance upon the trust estate, or for which the trust estate is responsible, for less than the amount, what is thus saved must go for the benefit of the cestuis que trustent.² But where the cestuis que trustent decline to accept the purchase, and refuse to pay the purchase-money at the time of the purchase, they cannot, after lying by until the speculation proves advantageous, then claim its benefits.³

2. And the same rule will extend to all persons standing in a fiduciary relation to each other, although not strictly and technically trustees; such as mortgagees and mortgagors;⁴ partners;⁵ or those who receive trust moneys, knowing the fact.⁶ And Lord *Hardwicke*, in *Morret v. Paske*,⁷ said the rule holds "with regard to agent, trustee, heir-at-law, or executor." And it has been also extended to the relation of guardian and ward; the directors of joint-stock companies; and indeed, as before stated, to all relations of confidence.⁸ In the case last cited, the Lord Chancellor discusses the question and the cases very extensively.

3. Indeed the rule is so strict in the English courts of chancery in regard to the duty of trustees to serve the interest of the cestui que trust, that no compensation is ordinarily allowed the trustee for his services, lest it tempt him to profit in that way.

4. The American cases maintain the same doctrine. Equity, it was held in one case,⁹ will not permit property to be reconveyed to one of several trustees, before his duties as trustee are ended, for the same consideration for which it was sold by them, except for the benefit of the cestui que trust. The rule that the trustee cannot become the purchaser of the trust property is of universal

² *Darcy v. Hall*, 1 Vern. 49; *Robinson v. Pett*, 3 P. Wms. 251.

³ *Barwell v. Barwell*, 34 Beav. 371.

⁴ *Baldwyn v. Banister*, in note to *Robinson v. Pett*, 3 P. Wms. 249, 251.

⁵ *Bentley v. Craven*, 18 Beav. 75; *Parsons v. Hayward*, 31 id. 199.

⁶ *Stroud v. Gwyer*, 28 Beav. 130. ⁷ 2 Atk. 52 and 54.

⁸ *Docker v. Somes*, 2 My. & K. 655, 665; *Lewin*, 228, 229.

⁹ *Boynton v. Brastow*, 53 Me. 362.

application.¹⁰ And guardians must account strictly for all the estate of their wards at the highest price realized, or which might have been realized by the exercise of due diligence, and for all income upon the same basis.¹¹ And a trustee who has been unfaithful in the administration of the trust will be allowed no commissions, but may receive pay for extraordinary services which were beneficial.¹² But it is laid down by the American courts, that all which can be required of trustees is the exercise of common skill, prudence, and caution.¹³ Mr. Justice *Woodruff*, of the New York Court of Appeals, in an important case,¹⁴ thus defines the rule of duty on the part of trustees: "The trustee is bound to employ such diligence and such prudence in the care and management [of the trust funds] as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs." Where a guardian received stocks of his ward and sold them, and afterwards kept his accounts upon the basis of still having them, it was held he must account for them at the highest rate they attained after the conversion.¹⁵ And in this case the guardian was charged with the expenses of the audit and denied commissions.

5. It seems to be considered as settled in the English chancery, that if the trustee himself put the trust money into his own business, by which he realizes a profit beyond the rate of interest on the public stocks, or other proper securities for the investment of trust funds, or even beyond the legal rate of interest, the cestui que trust is entitled to such profit. But if the trustee loan the trust money to others, who know of the breach of trust thus committed, the cestuis que trustent may follow the money into their hands, but they cannot claim any profits which they may have made beyond legal interest, but are limited to the compensation stipulated by

¹⁰ *Staats v. Bergen*, 2 C. E. Green, 297.

¹¹ *French v. Currier*, 47 N. H. 88. And where an administrator, by agreement of all interested, became the purchaser of real property belonging to the estate, for a fixed price, to be paid by a day named, which he failed to do, but afterwards sold the same at a higher price, he was held bound to account to the estate for the excess. *Parshall's Appeal*, 65 Penn. St. 224.

¹² *Moore v. Zabriskie*, 3 C. E. Green, 51.

¹³ *Neff's Appeal*, 57 Penn. St. 91.

¹⁴ *King v. Talbot*, 40 N. Y. 76, 85, 86.

¹⁵ *Lamb's Appeal*, 58 Penn. St. 142.

the borrowers, if that is not less than the trustee could have realized in a prudent investment.¹⁶

6. Where the surviving partner was made the executor of the deceased partner, and continued the business, taking in two other partners, it was held that he was accountable personally, and bound to pay over, to those entitled on behalf of the deceased partner, all the profits resulting from the improper use of the partnership effects, and that the subsequent partners were not necessary parties to the bill. The case of *Simpson v. Chapman*,¹⁷ where it was held such partners were necessary parties, was here commented upon, and held not well founded, and not, therefore, to be followed.¹⁸ In one case, the testator was a member of a partnership, in prosperous business, under articles by which, on the death of any partner, his share was to be taken by the surviving partners, at a price to be ascertained from the last stock-taking, and to be paid by instalments extending over two years, with interest at five per cent from his death. The value of the testator's share was ascertained, but not paid, the amount being allowed to remain in the hands of the firm, who treated it as a debt on the books, and allowed interest at five per cent, with yearly rests. There were three executors, one of whom was a partner in the business, at the time of the testator's decease, and one became a partner some years after, and one never was a partner. One of the residuary legatees declined to accept payment on the above footing, and brought a bill against the executors, claiming to be allowed a share in the profits of the partnership, as long as the money remained unpaid. The money had been suffered to remain in the concern with the knowledge of the testator's family, and all the residuary legatees approved of it, except the plaintiff. It was held, the bill could not be maintained; the court considering it not a case of continuing the money in the business, but a mere delay to collect promptly. (a)

¹⁶ *Stroud v. Gwyer*, 6 Jur. N. S. 719. See also *Dimes v. Scott*, 4 Russ. 195, which is commented upon in the case last cited.

¹⁷ 4 DeG., M. & G. 154.

¹⁸ *M'Donald v. Richardson*, 5 Jur. N. S. 9. See also *Palmer v. Mitchell*, 2 My. & K. 672, in note.

(a) *Vyse v. Foster*, L. R. 8 Ch. App. 309; 23 W. R. 355. There was another question of some practical importance decided in this case. The testator had devised his real estate, upon the common trusts for sale and conversion, making his whole estate a common fund. The executors had been advised that a few acres of freehold might be advantageously sold for build-

7. And where one of the trustees was in possession of railway debentures, executed to all the trustees, and, by means of a forged transfer in the name of all, sold the same, and the transfer had been recorded in the books of the company in favor of a bonâ fide purchaser, it was held, upon a bill by the other trustees, to have the transfer set back and declared void, that the possession of the debentures by one trustee gave him no implied authority to deal with them, and the transfer was declared void, and the entry in the books of the company was required to be cancelled, and the debentures to be delivered up to the trustees.¹⁹

8. The rule is well settled, that the trustee with power of sale cannot himself become a purchaser of the estate.²⁰ Nor can the trustee be allowed to make any profit, personally, out of the trust estate, even by charging for professional services performed by him for the benefit of the trust estate. But it has been held this will not extend to the case where the trustee, being a solicitor, employed his partner professionally on the part of the trust, upon the terms of such partner alone being entitled to the profits; and the court allowed the charges for his services.²¹

9. Where the husband, in making a settlement upon his wife,

ing lots, and that for that purpose it was desirable a villa should be built on some of them, which the executors did at an expense of £1600, which they had rented at £80 a year. Most of the other land had been sold, and the testimony tended to show that the expenditure had been advantageous to the estate. Vice-Chancellor *Bacon* having decided that none of the expenditures could be allowed the trustees, the Court of Chancery Appeal held, that as the trustees had, in the bonâ fide exercise of their judgment, expended this sum, as the best means of improving the estate, they could, at most, only be disallowed the amount of the loss, if any, occasioned to the estate by the expenditure.

¹⁹ *Cottam v. Eastern Counties Railway Co.*, 1 Johns. & H. 243. See also *Cowell v. Gatcombe*, 27 Beav. 568.

²⁰ *Ingle v. Richards*, 28 Beav. 361. But by statute the rule is very different in different states on this point. In some states, a purchase of any interest by the personal representative, at his own sale, is declared absolutely void, *Terwilliger v. Brown*, 44 N. Y. 237; while in others a more lenient rule of construction is adopted, *Clark v. Clark*, 65 N. C. 655. But everywhere, it is true, no doubt, that the settled presumption of equity law prevails, that such a purchase will inure to the benefit of the cestui que trust, if he so elects.

²¹ *Clack v. Carlon*, 7 Jur. n. s. 441. See also *Crosskill v. Bower*, 32 Beav. 86, where it was held that bankers could not make any profit of their trust or charge above five per cent on money advanced by them. See also *Tyrrell v.*

had assigned a policy upon his life, and covenanted with the trustees to keep up the policy; but the trustees neglected to obtain possession of the policy, or to give notice of the assignment to the office, and the same was subsequently mortgaged by the husband and finally surrendered, the husband appearing to be in insolvent circumstances, and unable to keep up the policy, and the trustees having no funds for that purpose, it was held that the trustees were not liable for the loss.²² But this seems a very favorable decision towards them.

10. The trustees, distributing the fund, upon a forged marriage certificate, to persons not entitled to it, were held liable to refund the same with interest from the date of the wrongful payment.²³ The question of the responsibility of new trustees, for not looking after the fund in the hands of the old trustees, is extensively discussed in a recent English case, and the point of what facts shall be sufficient to charge the new trustee with notice and default of duty is here largely considered.²⁴

11. The effect of agency for trustees is considered in a recent case,²⁵ where it was held that payment to the agent of the trustees is payment to the trustees. And if the agent pay the money, in good faith, to a party not entitled to hold it, whereby it is lost; such agent cannot be made responsible in a separate bill against him alone, without joining the trustees; since it is only through

Bank of London, 10 Ho. Lds. Cas. 26, where the question of the compensation of trustees, acting professionally as solicitors, is extensively discussed, and also the right of trustees to make profits for themselves. But where the trustee proved he gave full consideration, and purchased the trust estate with full and free consent on the part of the cestui que trust, a bill to set aside the sale was dismissed with costs. *Luff v. Lord*, 10 Jur. n. s. 1248. And after an ineffectual effort to sell a trust estate at auction, leave was given for one of the trustees to purchase it at the price at which it had been bought in, that appearing beneficial to the parties interested. *Farmer v. Dean*, 32 Beav. 327. And a trustee cannot retire from the trust for the purpose of becoming a purchaser. *Spring v. Pride*, 10 Jur. n. s. 646. But where the trustee has openly, and with perfect fairness, and with the concurrence of those having the beneficial interest in the estate, contracted for the purchase, the court will not set it aside. *Dover v. Buck*, 11 Jur. n. s. 580.

²² *Hobday v. Peters*, 28 Beav. 603.

²³ *Eaves v. Hickson*, 7 Jur. n. s. 1297; s. c. 30 Beav. 136. See also *Bar-ratt v. Wyatt*, 8 Jur. n. s. 1045, where payments were mistakenly made under a supposed order of court, and the trustees nevertheless held responsible.

²⁴ *Graves ex parte*, 8 DeG., M. & G. 291.

²⁵ *Robertson v. Armstrong*, 28 Beav. 123.

the trustees that such agents are liable at all. But co-trustees are not responsible for the fraud and forgery of one of their number to which they in no way contribute, either directly or remotely.²⁶

12. And the trustee, by mixing the trust money with his own, at his banker's or otherwise, will become responsible for the replacing of the money, and lawful interest during the intervening period.²⁷ But the *cestui que trust* cannot claim any balance remaining in the hands of the bankers of the trustee where it does not appear that any portion of such balance arose from the same identical money.²⁸ So, too, where the trustee makes an improper investment of trust funds, he becomes responsible for the same, with interest.²⁹

13. It has been held that a trustee of the stock of a manufacturing company, which had increased its stock, was justified in taking the new shares assigned to that he already held, on the behalf of the trust estate.³⁰

²⁶ *Barnard v. Bagshaw*, 9 Jur. n. s. 220 ; ante, §§ 107, 108.

²⁷ *Cook v. Addison*, Law Rep. 7 Eq. 466 ; s. c. 17 W. R. 480.

²⁸ *Brown v. Adams*, L. J. *Giffard*, reversing *V. C. James*, 21 L. T. n. s. 71 ; s. c. L. R. 4 Ch. App. 764. But the decision of the Vice-Chancellor seems to rest upon the more satisfactory reasons.

²⁹ *Whitney v. Smith*, Law Rep. 4 Ch. App. 513 ; s. c. 17 W. R. 579 ; *Fisher v. Gilpin*, 38 L. J. n. s. Ch. 230.

³⁰ *Daland v. Williams*, 101 Mass. 571.

CHAPTER XX.

THE DUTY OF TRUSTEES OF PERSONALTY.

SECTION I.

OF REDUCTION TO POSSESSION.

1. The trustee must take immediate possession of the funds.
2. Unless when invested upon ample real security.

§ 60. 1. ORDINARILY there will be no question in regard to the trustee taking possession of the trust property, and, if he accept the trust, it becomes his duty, the same as that of a careful owner, to enter at once into possession, and preserve the estate from all detriment or loss. And when the trust property is a chose in action, it is the duty of the trustee to require prompt payment; and where, through his indulgence, even when done in the utmost good faith, the debt is lost or seriously diminished, the loss will be visited upon the trustee.¹ Sir *William Grant*, M. R., here says: "If we get the length of neglect in not recovering this money by taking possession of the property, will they be relieved from that by the circumstance, that the loss has ultimately happened by something that was not a direct and immediate consequence of that negligence, viz., the decision of a doubtful question of law" [in another suit, having no connection with the trust]? His lordship answers his own pertinent question by saying, that if the trustees had collected the trust debt, the debtor would not have had the money in his possession, so that it could be lost by the unexpected decision in the other case.

2. But money outstanding upon good mortgage security, the executor or trustee is not required to call in before it is needed for use. Lord *Eldon* said, in one case:² "The court would not

¹ *Caffrey v. Darby*, 6 Vesey, 488, 495.

² *Howe v. Earl of Dartmouth*, 7 Vesey, 137, 150. See also *Orr v. Newton*, 2 Cox, 274.

permit a real security to be called in without an inquiry, whether it would be for the benefit of every person." But the trustees should assure themselves, it is said, that there is no reason to suspect the sufficiency of the security.³ And where the security is doubtful, they must insist upon payment at once.⁴ And where trust money is collected by more than one trustee, to save all question in regard to responsibility for the acts of each other, it is recommended by the most approved writers that the same be paid, at once, into some unquestionable bank of deposit.⁵

SECTION II.

THE MODE OF KEEPING TRUST FUNDS.

1. The degree of care and watchfulness required.
2. Some matters of duty stated more specifically. How trust funds should be invested.
3. The considerations affecting the appointment of new trustees.
4. The courts of equity will carry into effect decrees of other courts affecting trust funds.
5. Trustees made chargeable with trust funds invested upon real estate without sufficient inquiry, or through the fraud of the solicitor.
6. Trustee cannot dispose of trust property, pending proceedings to compel him to surrender it, without being liable to process for contempt of court.

§ 61. 1. WE have said so much, incidentally, in the course of the preceding portions of the work, in regard to the proper mode of keeping and investing trust funds, that little need be added here. This must be done, not only with the degree of care, skill, and watchfulness, which the trustee would exercise in regard to his own funds of like character and amount; but with that which the most vigilant exercise about such matters. It is to be considered in this connection, that while a man may adventure his own money in any enterprise or business which he deems promising in regard to a productive return, and he may do this with regard to his own property, without any imputation of want of prudence, since it is the natural course of trade and speculation, to incur more or less hazard in order to secure greater returns; but trust funds are of a more sacred character, and are intended for the most part,

³ *Ames v. Parkinson*, 7 Beav. 384.

⁴ *Lewin*, 230; *Harrison v. Thexton*, 4 Jur. n. s. 550. ⁵ *Lewin*, ib.

rather for the security of moderate returns, than to obtain larger income for the time, at the hazard of ultimate loss. It is therefore the duty of trustees to study for the attainment, so far as practicable, of absolute safety, so far as the preservation of the fund is concerned; and for the obtaining of the largest permanent income consistent with such entire safety of the corpus of the fund.¹

2. To enter into detail, in some respects the trustee is generally excused when the money is lost by robbery.² But in more recent cases the trustee has been held responsible, even in cases of robbery, where there was any ground to question the entire prudence of the trustee, as where the money was lost by the criminal act of the agent appointed by the trustee.³ And as it is now practicable, or desirable, to place trust funds where they cannot be taken by robbers, it will be the duty of the trustee to take these precautions. The English courts of equity sanction the investment of trust funds under their control, in the public securities of the kingdom, in bank-stock, East India stock, exchequer bills, and in annuities, as well as upon mortgage securities upon real estate, in England or Wales.⁴ And it is intimated by Lord Chancellor *Campbell*, in the Court of Chancery Appeal, the Lords Justices hesitating, that if the trustee invest trust funds in securities such as the court might not have approved or advised, if application had been made for that purpose in advance, he will not necessarily be regarded as guilty of a breach of trust.⁵ And where the fund is not in court, and the trustees act *bonâ fide*, and to the best of their discretion, they are entitled to the protection of the court.⁶ But the English courts manifest a preference for mortgage securities over East India stock.⁷ But investment in railway shares is not favored.⁸

¹ Lewin, 241 et seq. and cases cited.

² *Jones v. Lewis*, 2 Ves. Sen. 240.

³ *Bostock v. Floyer*, Law Rep. 1 Eq. 28.

⁴ 7 Jur. N. S. pt. 2, 58; *Equitable Interest Soc. v. Fuller*, 1 Johns. & H. 379; s. C. 7 Jur. N. S. 307; *Cohen v. Waley*, 7 Jur. N. S. 937; *Langford*, in re, 2 Johns. & H. 458; *Hurd v. Hurd*, 11 W. R. 50; *Stewart v. Sanderson*, L. R. 10 Eq. 26; *Langdale's Trusts*, id. 39.

⁵ *Colne Valley & Halstead Company*, in re, 2 DeG., F. & J. 53.

⁶ *Cockburn v. Peel*, 7 Jur. N. S. 810; *Miller v. Proctor*, 20 Ohio, n. s. 442.

⁷ *Ungless v. Tuff*, 30 Law J. N. S. Ch. 784.

⁸ *Harris v. Harris*, 29 Beav. 107. This was where the order was for invest-

3. The subject of appointing new trustees, and the principles by which courts of equity are governed in making such appointments, are extensively considered by the Court of Chancery Appeal in a late case.⁹ The doctrine thus declared is, that the court will have regard to the wishes of the person by whom the trust has been created, if expressed in, or clearly to be collected from, the instrument creating the trust; that it will not appoint a person to be trustee with a view to the interests of some of the persons interested under the trust, in opposition to the wishes either of the testator or of others of the trustees; and that in appointing trustees it will have regard to the question, whether the appointment will promote or impede the execution of the trusts, since the purpose of the appointment is, that the trusts may be better carried into execution. And the court should, in deciding whether to continue the former trustees, have reference to their harmonious action among themselves, and, where that cannot be attained without a change of trustees, that will be good ground for the change.¹⁰

4. The Court of Chancery Appeal will carry into effect an order of the Divorce Court, directing the dividends of a fund in court, to which the wife was entitled for her separate use, to be applied as though she were dead. But in the absence of persons interested in the corpus of the fund, the costs will not be thrown upon that.¹¹

ment in the funds of any company incorporated by act of parliament, and it was held not to warrant an investment in preference railway shares. *Post*, § 68.

⁹ *Re Tempest*, 12 Jur. n. s. 539; s. c. Law Rep. 1 Ch. App. 485.

¹⁰ *Quackenboss v. Southwick*, 41 N. Y. 117.

¹¹ *Pratt v. Jenner*, 12 Jur. n. s. 557; s. c. Law Rep. 1 Ch. App. 493. It seems to be well settled, that trustees may place the trust money in a responsible bank for safe custody, so long as it is proper to keep the money on hand, but not to their own private account. *Rowth v. Howell*, 3 Vesey, 565; *Wren v. Kirton*, 11 Vesey, 377. It would seem that where there are co-trustees, the deposit should be in the name of all and subject to the checks only of all the co-trustees. *Lewin*, 243. But in one case the bank paid out the money upon the check of a single trustee in such case, and the other trustees were not held responsible. *Kilbee v. Sneyd*, 2 Moll. 186. But a trustee who deposits money in a bank for safe custody, when it was his clear duty to have invested it where it would be productive, will be responsible for the bank. *Moyle v. Moyle*, 2 R. & My. 710. And the same holds true where he so deposits it when he should have paid it over to new trustees, *Lunham v. Blundell*, 4 Jur. n. s. 3; or paid

5. Where the trustees had invested trust money upon a hotel property in the country, having sent down a London surveyor, who valued the hotel, including therein the license, at nearly double the sum to be advanced, where the hotel turned out to be worth much less than the sum advanced, and the trustees gave no further account of the circumstances under which the advance was made, it was held, reversing the decision of *Bacon*, V. C., that the trustees were chargeable with the sum so advanced.¹² Lord Justice *James*, in giving judgment, said, "In my opinion, it would be *pessimi exempli* if it should go forth to the world that trustees might lend trust money under such circumstances as these before us. . . . It appears to me that that report is one upon which no sensible or prudent man would ever lend such a sum as £14,000. . . . The value of a hotel is necessarily of a very speculative character, and may, like the property in the case of *Stickney v. Sewell*,¹³ arise from accident." So the trustee is responsible for loss occasioned by the solicitor not disclosing mortgages known to him as being upon the land taken for security.¹⁴

6. After the institution of proceedings in court to compel the trustee to surrender the trust property, either to the custody of the court or its appointee, he cannot dispose of it; and, if he attempt to do so, he will be liable to be proceeded against, summarily, as for contempt of court.¹⁵

SECTION III.

THE DISTRIBUTION OF TRUST ESTATES.

1. The trustee will act on his own responsibility.
2. Unless he procure an order of court.
3. The trustee must know and observe the law of his own country, but not the foreign law.
4. Payments by mistake, to infants, partnerships, &c.
5. Paying trust funds from one set of trustees to another. Release, &c.

it into court, *Wilkinson v. Bewick*, id. 1010. But this rule will not hold where trust funds are kept by the trustee in bank during the first year after the decease of the testator, where there are no special directions in the will for investment, and the estate has not been wound up. *Johnson v. Newton*, 11 Hare, 160; *Swinfen v. Swinfen*, 29 Beav. 211.

¹² *Budge v. Gummow*, L. R. 7 Ch. App. 719.

¹³ 1 My. & Cr. 8.

¹⁴ *Hopgood v. Parkin*, 18 W. R. 908.

¹⁵ *Wartman v. Wartman*, *Taney*, C. C. 362.

§ 62. 1. WHENEVER the purposes of the trust are accomplished, and it becomes the duty of the trustees to pay the money or surrender the estate, constituting the trust fund, into the hands of those entitled to receive it, they will be bound, at their own peril, to determine rightly who are entitled to receive it, before parting with the same.¹ In case of an assignment, where notice has been given the trustee, he cannot pay to the assignor with safety.² And even where the trustee acts under the advice of counsel, he is not freed from responsibility. In one case,³ Lord *Redesdale*, Chancellor, said, "If, under the best advice he can procure, he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer."

2. The trustee may take a bond of indemnity, or he may institute a suit, in the nature of a bill of interpleader, against the parties claiming the fund, and obtain a decree of a court of equity which will exonerate him from all further responsibility.⁴

3. The executor or trustee will be bound to know and to observe the requirements of the law of his own country or jurisdiction; but not, it has been held, that of a foreign country, where parties entitled to the fund may reside.⁵ The Vice-Chancellor here held, that where, after the death of the husband, the executors paid a legacy to the wife to her, she being domiciled in Scotland, where the law gave her choses in action to the husband, although not reduced to possession during the coverture, that this was to be regarded in the nature of an assignment of the legacy by the wife, and the executors were not bound to act upon it until it was brought to their knowledge. But Mr. Lewin⁶ very properly suggests, that as the rights of parties cestuis que trustent may be governed to some extent by the law of their domicile, it will be prudent for executors and trustees, in dealing with them, to inquire into the foreign law.

4. But it seems to be settled, that where a trustee pays the money by mistake to the party not entitled to receive it, and is

¹ Lewin, 280; *Sheridan v. Joyce*, 7 Ir. Eq. Rep. 115.

² *Beddoes v. Pugh*, 26 Beav. 407.

³ *Doyle v. Blake*, 2 Sch. & Lef. 243.

⁴ Lewin, 283; ante, Vol. I. p. 492 et seq. And as the trustee is not bound to run any risk, if there be any doubt he may institute a suit, and all costs will come out of the fund. *Ib.*

⁵ *Leslie v. Bailie*, 2 Y. & C. C. C. 91.

⁶ *Trusts*, 282.

afterwards compelled to pay it to the rightful claimant, he will not be chargeable with interest.⁷ And where an infant cestui que trust represented himself of full age, and thus obtained the fund before he was really entitled to receive it, it was held that he could not compel the trustee to pay him again when he came of full age,⁸ except upon the terms of surrendering what had been obtained through fraud and misrepresentation. But the release of an infant cestui que trust under such circumstances will not bind the person when of age. The distinction seems to rest upon the ground that the infant was of sufficient age to commit such a fraud as will be binding upon him, but not to execute a valid contract.⁹ Funds due to a partnership may be safely paid to the surviving partners; or in similar circumstances to the surviving trustees.⁹ Where the trustee has overpaid a particular party he may recoup the same upon other portions of the fund due the same party.¹⁰ But the courts of equity in England have manifested some reluctance to maintain a separate suit for the recovery of an over payment to the cestui que trust, unless it appear very clearly that it was done without any fault on the part of the trustee. But we see no good reason for any such reluctance, except that, in such cases, it will be proper to scrutinize the proof with some carefulness, and not to yield such relief except upon most unquestionable evidence, since the presumptions will always be against such over payments having occurred. And where the proof is entirely satisfactory, we see no reason to question the ground of relief.¹¹ But where the over payment or wrong payment has been produced by any misconduct on the part of the cestui que trust or any one claiming to act on his behalf, the courts will always afford ready and ample relief.¹²

5. In paying over trust funds from one set of trustees to another, it will be natural that the former trustees should expect a general release, and Mr. Lewin says that is more commonly acceded to in England. We see no objection to such a course, since the release will not extend to any case purposely kept secret

⁷ *Saltmarsh v. Barrett*, 31 Beav. 349; *Sparhawk v. Admr. of Buel*, 9 Vt. 41.

⁸ *Overton v. Banister*, 3 Hare, 503.

⁹ *Lewin*, 286, 287.

¹⁰ *Lewin*, 287.

¹¹ *Lewin*, 287; *Livesey v. Livesey*, 3 Russ. 287; *Downes v. Bullock*, 25 Beav. 54; *Bate v. Hooper*, 5 DeG., M. & G. 338.

¹² *Hood v. Clapham*, 19 Beav. 90.

by the old trustees from the new ones. The present Lord Chancellor, *Hatherley*, when Vice-Chancellor,¹³ intimates that the old trustees may properly claim some sort of a discharge, but not a release, unless where the trust was created by deed; and this seems very just and reasonable, but it has not been always acted upon.¹⁴ The expense of the release should be paid out of the trust fund, and will more naturally and conveniently be drawn by the professional advisers of the former trustee, as he is the party to be benefited by it.

¹³ *Re Wright's Trusts*, 3 Kay & J. 421.

¹⁴ *King v. Mullins*, 1 Drewry, 308.

CHAPTER XXI.

TRUSTEES FOR SALE.

SECTION I.

GENERAL DUTIES.

1. May always proceed without order of court, until that is applied for.
2. Must obtain the best price, and serve the interests of cestui que trust.
3. Joint trustees responsible for each other. Time allowed trustees.
4. Cannot, in general, execute valid mortgage.
5. Conferred on two or more, goes to survivors.
6. Sale may be either private or public.
7. Trustees not expected to covenant for title.
8. The court may permit an agent of the trustee to bid at his sale.
9. Courts of equity will not control discretion of trustees for sale.

§ 63. 1. It seems to be the settled rule of the English Chancery, that a trustee for sale may always proceed with safety without applying for direction from the courts of equity, but if the matter be once brought into court, it is then regarded as a contempt of court to proceed to dispose of the fund without the sanction of the court; and where that is done it is always in form made, subject to the sanction of the court to be obtained within a limited time, and to be void on failure.¹

2. The general duties of trustees for sale are sufficiently obvious, and have been already adverted to in different portions of this volume and the preceding ones. They must study to obtain the best price² and upon the best terms of payment and security which the market will afford. Indeed, unless under rare circumstances, as to the amount and kind of property, all sales by trustees should be made for ready pay. Lord *Eldon*, Chancellor, said, in the last case cited: "A trustee for sale is bound to bring

¹ *Bath v. Bradford*, 2 Ves. Sen. 587; *Walker v. Smalwood*, Amb. 676.

² *Downes v. Grazebrook*, 3 Mer. 208.

the estate to the hammer, under every possible advantage to his cestui que trust." The more usual course in England seems to be for the cestui que trust to enter into a contract for the sale upon such terms as are satisfactory to him, he being the party chiefly interested, and for the trustee upon examination, and after being satisfied that the price and terms of sale are such as he ought to approve, to consent to the sale.³ Trustees for sale will be justified in employing experienced men to examine and estimate the value of the property. Sir *R. P. Arden*, M. R., said,⁴ "They (the trustees) did every thing proper to pave the way for a sale. They had a valuation made, and they determined, as was their duty, not to let the premises go for less than that valuation."

3. In cases of this character joint trustees are responsible to the full extent for the conduct of each other, even where one or more lie by and allow the business to be transacted by the others.⁵ Trustees for sale must be allowed a reasonable time to accomplish the objects of the trust, according to circumstances, as in other cases.

4. A trust for sale will not, in general, enable the trustees to execute a valid mortgage. Where the object of the trust is to convert the estate, "out and out," into money, the trustees cannot mortgage, that not being in furtherance of the objects of the trust.⁶ But where the object of the trust is merely to raise certain charges upon the estate, and then to pass the estate or its avails to others, although the trust may assume the form of a trust for sale, it will be equally well accomplished to execute a mortgage for enough to raise the charges upon the estate.⁷ A power to mortgage has been held not to justify a mortgage with power of sale.⁸ But a power to raise money by sale or mortgage has been held to embrace a mortgage with power of sale.⁹ And where the court

³ *Palairot v. Carew*, 32 Beav. 568.

⁴ *Campbell v. Walker*, 5 Ves. 678, 680.

⁵ *Oliver v. Court*, 8 Price, 166.

⁶ *Lewin*, 315.

⁷ *Ball v. Harris*, 4 M. & Cr. 264; *Stroughill v. Anstey*, 1 DeG., M. & G. 645; *Page v. Cooper*, 16 Beav. 400. See ante, § 32, pl. 4, and n. 10, where a somewhat different opinion as to the right of the executor to pledge or mortgage the assets is intimated, but under protest. We regard the law as better stated here.

⁸ *Clarke v. Royal P. Society*, 4 Drewry, 26.

⁹ *Bridges v. Longman*, 24 Beav. 27. See also *Russell v. Plaice*, 18 Beav. 21; *Leigh v. Lloyd*, 2 DeG., J. & S. 330.

has power to raise money out of an estate, it may do it by a direct sale, or by mortgage, with power of sale.¹⁰ The trustee must pursue the directions of the trust deed to create a valid mortgage.¹¹

5. Where a power of sale is conferred on two or more, it will go to the survivor or survivors, in case of the decease of one or more of the trustees.¹² And it will make no difference that there exists a power to appoint new trustees in the place of those deceased. But the deed of settlement may be so drawn as to require the appointment of new trustees before they proceed to act.¹³

6. The sale may, unless the power otherwise provide, be either at public auction or on private arrangement, according as the one or the other is deemed most expedient.¹⁴ But the trustee cannot delegate the power so as to have it executed by another upon his own responsibility, but he may employ such assistants and agencies as are usual in the place of the sale.¹⁵ But if the trustee deem a public sale most expedient, he must see to it that all proper advertisements are made, and every thing done to prevent the sacrifice of the property. The courts of equity will stop the sale, on application of the cestui que trust, until this is done.¹⁶

7. Trustees are not expected to covenant for good title beyond their own acts; but they will, like all other parties, be required to show a good title in order to enforce specific performances of contracts of sale made by them, unless they gave the purchaser notice of some defect of title before the sale.¹⁷ If one offer real

¹⁰ *Selby v. Cooling*, 23 Beav. 418.

¹¹ *Hewitt v. Townshend*, 31 Md. 336. See *Boeram v. Schenck*, 41 N. Y. 183.

¹² *Lane v. Debenham*, 11 Hare, 188. But a joint power of sale to two or more cannot be executed by any number less than the whole, while all are living, and in condition to act. *Learned v. Welton*, 40 Cal. 349. But where a power of sale in the discretion of two executors is given by the will, this will be construed as an incident of the office of executors, and if one resigns his office the other may execute the power. *Gould v. Mather*, 104 Mass. 283. When the purpose of a power fails the power ceases. *McCarty v. Deming*, 4 Lans. 440.

¹³ *Lewin*, 319.

¹⁴ *Lewin*, 319, 320.

¹⁵ *Lewin*, 320. Ex parte *Belchier*, Amb. 218.

¹⁶ *Anonymous*, 6 Mad. & Geld. 10. This was for want of notice to all parties interested. *Lewin*, 322.

¹⁷ *White v. Foljambe*, 11 Ves. 345.

estate for sale, generally the implication is that he proposes to sell the entire title, and he will be required to produce such title or the courts of equity will not interfere on his behalf.¹⁸ And mortgagees with power of sale stand in the same position as other trustees in this respect.¹⁹ Trustees may give their solicitor or other agent power to receive the money upon sale of the trust property, but unless such authority is given, a payment to the solicitor will not be binding upon the trustees.²⁰

8. The trustee cannot become a purchaser at his own sale, unless the instrument of trust specially provides that he may bid at the sale; nor can any one in his interest become a purchaser at such sale, unless by such special permission. But it has been held that the court directing the sale may permit the wife of the trustee to bid for the property.²¹

9. Courts of equity will not control the discretion of trustees for sale of real estate, unless there is satisfactory evidence that they are exercising such discretion improperly or unwisely.²²

SECTION II.

POWER OF TRUSTEES TO EXECUTE RECEIPTS FOR PURCHASE-MONEY.

1. Ordinarily, a trustee for sale will have full power to receive the purchase-money. Distinction between power and trust.
2. The fact of creating such a trust implies that. Notice of fraudulent purpose.
3. The power to invest and re-invest implies the power to receive the money.
4. Executor must join to pass title to lands charged. Cases of lapse.

§ 64. 1. THE more common case of trusts with power of sale, is where the testator devises his estates together with all his personality, directing that the latter be first applied in the payment of debts, or of debts and legacies; and in default of it proving sufficient, that the real estates be sold by the trustees, either gener-

¹⁸ Lord *Eldon*, Chancellor, in *White v. Foljambe*, supra.

¹⁹ *Lewin*, 325.

²⁰ *Robertson v. Armstrong*, 28 Beav. 123; *Re Fryer*, 3 Kay & J. 317.

²¹ *Dundas's Appeal*, 64 Penn. St. 325. But in such cases the trustee is liable to very strict scrutiny in his conduct of the sale. *Cadwalader's Appeal*, 64 Penn. St. 293.

²² *Eldredge v. Heard*, 106 Mass. 579.

ally in their direction, or in some order named in the will. In all such cases it will be the duty of the trustees to assure themselves that a deficiency in the personalty has really occurred before they can properly proceed to sell real estate. The difference between a power of sale and a trust for sale, in this respect, may be important to be borne in mind. A power of sale in the event of the personal estate proving insufficient to pay debts or legacies, or both, is a power depending upon a condition precedent, and will not attach unless the condition occur; and a sale under such a power, when the condition had not in fact occurred, will, of course, convey no title. It is, therefore, in a case of this kind essential, that all persons interested in the purchase and in acquiring good title, should assure themselves that the power has really attached. In such a case the receipt of the money by the appointee will have no effect upon the passing of the title, and will commit no one to its application or repayment except the person receiving it. But in the case of a trust for sale under a will, the title having passed to the trustee, the title will pass upon any such sale as rests upon an apparent occurrence of the emergencies justifying a sale; and the payment of the money by the purchaser to the trustee, and his receipt for the same, will exonerate the purchaser from all responsibility.¹ And the purchaser cannot be held responsible for the application of the purchase-money by reason of the trustee selling more land than was strictly required.²

2. The very fact of creating a trust for sale implies that the trustee may execute valid receipts for the purchase-money. And unless there is notice to the purchaser, or some good ground of suspecting that there is an intention of misapplying the money, the purchaser will not be considered guilty of any want of proper caution in paying the money to the trustee and accepting his receipt for the same, and will be held exonerated from all further responsibility.³ And the rule will apply to cases where some of the

¹ *Walker v. Smalwood*, Amb. 676. A power of sale is not inconsistent with a devise in fee to another; and, in such case, the estate will vest in the devisee, subject to the execution of the power, provided the exigency occurs. *Crittenden v. Fairchild*, 41 N. Y. 289. A power to sell as the executor shall deem expedient, and for the best interests of legatees, requires the exercise of such discretion in order to a valid sale. *Russell v. Russell*, 36 N. Y. 581.

² *Spalding v. Shalmer*, 1 Vern. 301.

³ *Lewin*, 334, 335; *Balfour v. Welland*, 16 Ves. 151, 156.

cestuis que trustent are infants.⁴ And especially when any special confidence is reposed in the trustees, as to the application of the trust money, will the purchaser be held exonerated upon payment to them.⁵ And that must be regarded as always the case in regard to trusts to pay debts,⁶ generally, or debts and legacies.⁶

3. The power in the trustee to vary the securities, or to invest the trust fund and reinvest it, in his discretion, implies the right to receive the money and to execute valid receipts for it.⁷ But see *Cox v. Cox*,⁸ where this is made dependent on the intention as gathered from the terms of the deed of settlement. Trustees of land charged with the payment of debts, although there is no express authority to sell, it has been held, must take such power connected with the trust and in order to carry it into effect.⁸ And such power of sale must carry, by implication, authority to receive the purchase-money. And although more commonly the executors and trustees in such cases are the same persons, and where this is not the fact the executors have more commonly united with the trustees in carrying the sale into effect, there is not any case which seems to treat this as at all indispensable to the validity of the sale.⁹

4. There seems to be some question how far a devisee of land subject to the payment of debts can be said to have such an interest that he can convey the absolute title to a purchaser with knowledge of the trust.¹⁰ Lord *Eldon*, Chancellor,¹⁰ said such a devise made the estate equitable assets for the payment of debts. The more common view in regard to debts or legacies being charged upon land, under the registry system, is, that it creates a lien upon the land, and that those persons intended to be benefited by the charge, must be treated as cestuis que trustent, and are therefore entitled to follow the land until these claims are discharged. But it would seem, that if the executor join in the sale of land subject to such a charge and receive the money, as he is the one specially appointed to pay debts and legacies this will exonerate the land from the charge, and release the purchaser from

⁴ *Sowarsby v. Lacy*, 4 Mad. 142.

⁵ *Doran v. Wiltshire*, 3 Swanst. 699.

⁶ *Forbes v. Peacock*, 11 Sim. 152; *Lewin*, 336.

⁷ *Wood v. Harman*, 5 Mad. 368.

⁸ 1 Kay & J. 251.

⁹ *Lewin*, 340-342.

¹⁰ *Bailey v. Ekins*, 7 Ves. 319, 323; *Lewin*, 344.

any further obligation to see to the application of the purchase-money.¹¹ But it seems to be settled that if the testator merely charge his land with the payment of debts or legacies and it descend to the heir, subject to such charge, he cannot sell the land and receive the purchase-money, so as to exonerate the land from the charge, since there is no confidence reposed in the heir, such as is in an executor, in regard to the payment of debts and legacies.¹² But in such cases it seems to be considered that, by necessary implication, the executor must have the power to sell.¹³ And where the estate is devised to one who predeceases the testator, subject to charges for the payment of debts and legacies, the trust must of necessity be carried into effect through the instrumentality of a court of equity.¹⁴ And the result would seem to be that, unless the will gives the devisee of land subject to charge authority to sell and apply the money to discharge the trust, it will devolve upon the executor, and he must join in the sale either to certify the charge is already removed, or else to receive and apply the purchase-money to that purpose, so far as it may be required. A mere agent, as a banker or broker who is employed by the executor or trustee to make sale of the trust fund, is not chargeable with any duty except to his employer; and even where the circumstances might justly excite suspicion of a fraudulent purpose on the part of the trustee towards the fund, this will impose no duty upon such agent to interpose any hindrance against the action of the trustee.¹⁵ But an agent who derives a benefit from the breach of trust will be responsible.¹⁶

¹¹ *Elton v. Harrison*, 2 Swanst. 276, note a.

¹² *Lewin*, 345; *Gosling v. Carter*, 1 Coll. C. C. 650.

¹³ *Robinson v. Lowater*, 17 Beav. 601; *Forbes v. Peacock*, 11 M. & W. 630.

¹⁴ *Lewin*, 347.

¹⁵ *Keane v. Robarts*, 4 Mad. 332, 356, 359.

¹⁶ *Pannell v. Hurley*, 2 Coll. C. C. 241. This was where the banker had the trust fund applied to the payment of a private debt of the trustee at the bank.

SECTION III.

THE TRUSTEE CANNOT PURCHASE OR PROFIT BY SALE.

1. The trustee must account to the cestui que trust for all he receives, in any form, on account of the trust.
2. Right of trustee to deal with trust funds, to repair, and the disposition of surplus and extra dividends.
3. Trustee with full powers may make valid sale.
4. Definition of trustee's responsibility in New Jersey case.
5. Consideration of some English cases.
6. Responsible for loss by too large balance at bank.

§ 65. 1. THE trustee is not absolutely prohibited from becoming the purchaser at his own sale. For he may do this to save the property from absolute sacrifice, at a public auction without reserve. But his sale will be subject to the right of the cestui que trust to take the estate, or to let the sale stand, if he so elect, as being the best price obtainable.¹ And if the trustee do purchase, and then upon a resale obtains more than he gave, he must account for the difference to the trust fund, unless the sale to him had been before, understandingly and freely, and upon proper advice, confirmed in him.² The same rule extends to all agents of the trustee and to volunteers acting for his ultimate benefit. The rule is so stringent, that courts of equity will not allow the trustee by means of any devise or evasion to become the purchaser of the trust estate or of any interest on use therein, unless at the election of the cestuis que trustent and where they act under competent and separate legal advice, or where the relation of trustee and cestui que trust has been effectually dissolved for a sufficient length of time for the latter to have fully recovered their independent position.³ We have already incidentally said so much upon this general subject in other portions of the work, that we need not dwell further upon it, at the present time, than to state that the doctrine is fully established in all the American states, so far as we know.⁴ This subject is extensively and learnedly discussed by court and counsel in a recent case in the New York Court of Appeals,⁵

¹ *Ex parte Lacey*, 6 Ves. 625.

² *Fox v. Mackreth*, 2 Br. C. C. 400 ; s. c. 2 Cox, 320.

³ *Lewin*, 359-372.

⁴ *Faucett v. Faucett*, 1 Bush, 511.

⁵ *Penman v. Slocum*, 41 N. Y. 53. But whether a contract between trus-

and the proposition established, that where the trustee purchases the trust property, without any dissent on the part of the cestui que trust at the time, but at a serious discount from the true price, and subsequently resells the same at a very great advance above the price at which he bought it, the court will compel him to account with the cestui que trust for the advance in price, and the suit for that purpose may be brought by the cestui que trust before the actual payment of the money on the resale, and the court will declare the principles upon which the trustee is ultimately to account.

2. It is scarcely necessary to state, that a trustee cannot pledge the trust property for his own debt,⁶ or in any other way deal with it, except in furtherance of the objects of the trust. The trustee must of necessity have the right to incur all needed expense for repairs upon the trust estate to come out of the income.⁷ And, as a general rule, all accumulated capital or surplus dividends must be regarded as belonging to the corpus of the fund, and not to the life tenant, as we have before stated.⁸

3. But it has been held, that where a trustee is clothed with full power to manage and control the trust estate, an assignment by him of a mortgage, impressed with the trust to a bona fide purchaser or pledgee, cannot be impeached by the cestui que trust.⁹

4. The duty of the trustee to account for all profits made from trust property is illustrated in a recent case in New Jersey.¹⁰ It was here declared that the trustee cannot become the purchaser of the trust property, at his own sale, either directly, or through the intervention of another, but the property will remain trust property as before. So where the trust property is exchanged, that which is received in exchange will be impressed with the trust to the value of the trust estate. And if the trustee deals with the trust property he assumes all risk of loss, and whatever is gained

tee and cestui que trust is fair, is matter of fact for the jury. *Brown v. Cowell*, 116 Mass. 461. If so found a court of equity will not interfere. *Ib.* But if he put trust money to his own use he is liable at once, although the trust securities were not due. *Ib.* *Staples v. Staples*, 24 Gratt. 225.

⁶ *Shaw v. Spencer*, 100 Mass. 382.

⁷ *Kearney v. Kearney*, 2 C. E. Green, 59.

⁸ *Van Doren v. Olden*, 4 C. E. Green, 176. But see *Minot v. Paine*, 99 Mass. 101.

⁹ *Dillaye v. Bank*, 51 N. Y. 345.

¹⁰ *Blauvelt v. Ackerman*, 5 C. E. Green, 141.

belongs to the trust. Property purchased with the estate of a ward, by the guardian, will, at the option of the ward, inure to the benefit of the ward. And where a creditor of the trustee sells the trust estate in satisfaction of the debt of the trustee, the purchaser being aware of the trust will be held responsible to it.

5. The foregoing principles are fully recognized in all the modern equity cases where they have been involved. Thus, it was said,¹¹ the trustee, with power of sale, cannot himself become a purchaser of the estate. Nor can the trustee be allowed to make any profit, personally, out of the trust estate, even by charging for professional services performed by him for the benefit of the trust estate. But the trustee has been allowed to employ his partners as solicitors for the trust, all the profits being received by him.¹² And where the trustee makes an improper investment of the trust property he becomes responsible for the estate and interest.¹³

6. So, too, where the trustee had suffered a balance to remain in his trustee account with his banker, to the extent of £30,000, whereby it was lost upon the failure of the bank, he was held responsible for all above £1000, that being regarded as the utmost limit for such balance, even when the trustee expected soon to be called upon to pay off a mortgage upon the estate.¹⁴

¹¹ *Ingle v. Richards*, 28 Beav. 361.

¹² *Clack v. Carlon*, 7 Jur. N. S. 441.

¹³ *Whitney v. Smith*, L. R. 4 Ch. App. 513; *Collier v. Munn*, 41 N. Y. 143.

¹⁴ *Astbury v. Beasley*, 17 W. R. 638.

CHAPTER XXII.

TRUSTEES FOR THE PAYMENT OF DEBTS.

SECTION I.

THE FORM AND VALIDITY OF SUCH TRUSTS.

1. General rights of debtors to create trusts for the payment of debts.
2. Must not be fraudulent in fact, or in conflict with the bankrupt and insolvent laws.
3. Duty of trustees to convert fund into money, pay debts, as far as it will reach, and to return any surplus to the assignors.
4. Must make good any default caused by unreasonable delay, and the consequent costs. Infant trustee held responsible, after coming of full age.
5. Where all debts and expenses are charged upon the estate, real and personal, it creates in the executors a trust for sale.

§ 66. 1. THERE can be no doubt in regard to the right of a debtor, while living, or by last will, to create trusts for the payment of his debts. And he may make these trusts in any form he chooses, not inconsistent with the general rights of his creditors. And in many instances he may create trusts for the payment of his debts, more or less in conflict with the strict rights of his creditors, provided he treat them all alike, and meet all that is due to the full extent of his estate upon which the creditors have any legal or equitable claim. But this general subject has been so thoroughly discussed, in former portions of the work, so far as the estates of deceased debtors are concerned, and assignments for the benefit of creditors are now so infrequent, under the bankrupt and insolvent laws, that we shall not attempt to discuss the points of law involved. We hope to recur to the subject hereafter.

2. It may be proper to say in brief, that all such assignments for the benefit of creditors will be wholly avoided by any actual fraudulent purpose, as if made with a view to secure the use of the property for the assignor.¹ And the same result will follow when the

¹ Twyne's Case, 3 Co. Rep. 80 a.

arrangement is in conflict with the bankrupt and insolvent laws in force when made.²

3. It will be the general duty of the trustees, under such an assignment, to convert the property assigned into money, in the shortest convenient time and in the most productive manner, and to apply the avails to the purposes of the trust in a faithful, and diligent, and prudent manner, and to return to the assignor any surplus which may remain in their hands, whether so named in the deed or not, that being the implication of law as a resulting trust.³

4. The testator gave all the residue of his estate, real and personal, to four trustees, upon trust, to sell his freehold estates at L, and such part of his personal estate immediately after his decease, or as soon thereafter as the trustees might see fit to do so, and either by auction or private contract as to the trustees might seem proper. The personal estate comprised shares in an unlimited banking company, which was of high standing and repute at the testator's death. The trustees retained these shares two years and a quarter, when the bank suspended payment, and the company was wound up. Three months after the testator's death, the trustees also accepted new shares in the bank, which were allotted to the holders of old shares, and the entire loss to the estate amounted to £1910. It was held, upon a bill filed to administer the estate, that the trustees, although they had acted in entire good faith, and as they considered for the best interests of the estate, were bound to have sold the shares in a reasonable time, which was one year from the decease of the testator, and were therefore bound to make good the loss on both sets of shares.⁴ It was also held that one of the trustees who did not come of age until seventeen months after the testator's death was equally liable with his co-trustees, and that all costs caused by the litigation in regard to the default of the trustees must be paid by them.

5. Where the testator makes his debts and all administrative expenses a charge upon all his estate, real and personal, this creates a trust for sale in the executors, and their deed will pass both the legal and equitable title. In such cases the purchaser will not

² Lewin, 374 et seq.

³ Lewin, 387 et seq.

⁴ *Sculthorpe v. Tipper*, L. R. 13 Eq. 232.

be responsible for the application of the purchase-money, unless connivance with the executors in a division of it be shown on his part.⁵ And where the will requires an estate to be sold, but appoints no trustee for that purpose, the trust devolves upon the executor.⁶

⁵ Dewey's Exrs. *v.* Ruggles, 25 N. J. Eq. 35.

⁶ Louderbough *v.* Weart, 25 N. J. Eq. 399.

CHAPTER XXIII.

WHEN CONVEYANCE BY TRUSTEE OF TRUST ESTATE WILL BE PRESUMED OR DECREED.

1. Court of equity will decree conveyance by trustee.
2. It will also presume such conveyance to quiet title.
3. A court of law may direct a jury to make such presumption.
4. And where the title vests in the heir, he will be presumed to have conveyed to the one equitably entitled.

§ 67. 1. THERE is one point, connected with the title of real estate in the hands of trustees under wills or family settlements, which will be of practical importance to be here stated. Where a trustee holds real estate for the benefit of the cestui que trust, and which he is bound to convey immediately to such cestui que trust in performance of such trust, a court of equity, upon familiar principles of equity law, will compel the trustee to make the conveyance.¹

2. It will also presume the conveyance to have been made by the trustee in performance of his duty, whenever that becomes necessary, in order to quiet the title in the cestui que trust.¹

3. A court of law will also, in such cases, direct a jury to presume a conveyance by the trustee to the cestui que trust whenever that becomes necessary, in order to quiet the title in him, although the usual term for making such presumptions has not transpired.²

4. And where a power to convey to a particular person is given to the executor in order to perfect the disposition of the property, but the title vests in the heir at the decease of the testator, there being no provision vesting it in the executor, such heir will be compelled by decree of a court of equity to join with the executor in conveying the title to the person entitled under the will, and, after a considerable lapse of time, although less than twenty years, such conveyance of the title by the heir may be presumed by a court or jury, having the question before them.¹

¹ Greenough v. Welles, 10 Cush. 571.

² England v. Slade, 4 T. R. 682; Doe v. Sybourn, 7 T. R. 2.

CHAPTER XXIV.

THE DUTY AND RESPONSIBILITY OF TESTAMENTARY TRUSTEES.

1. All trustees, whether acting gratuitously or for pay, are bound to strict care and diligence.
2. Investment of trust funds should be in public securities or real estate mortgages.
3. Trustee acting upon advice of competent counsel cannot be made responsible for consequences.
4. Rule as to opening former decrees upon portions of the same account.
5. Ground of denying trustee commissions and charging him with compound interest.
- n. 1. Trustees entitled to compensation, where appointed under that expectation. Nature of the responsibility further discussed.

§ 68. 1. TESTAMENTARY trusts, from the very definition of the duty, being of the nature of a trust for compensation,¹ will

¹ Trustees and others standing in similar relations have more commonly been allowed reasonable compensation for their services, in the American courts of equity, as already intimated. And in the English equity courts that practice is becoming more common, and although it is there treated as an exception to the general rule, we think the true exposition of the matter makes the rule the same, both in this country and in England. Compensation is allowed, in both countries, when, from the circumstances attending the case, it is evident the parties expected such compensation would be made. It was accordingly allowed where the testator appointed, as trustee and executor, a person, who for many years had been the paid receiver and manager of his estate, and the tenant for life was an infant. *Newport v. Bury*, 23 Beav. 30. See also *Marshall v. Halloway*, 2 Swanst. 452, 453; *Ex parte Fermor*, Jacob, 404, 406; *Warbass v. Armstrong*, 2 Stockton, Ch. 263. A direction for the trustee to keep funds at interest implies the right to reinvest and change securities in the discretion of the trustee. *Miller v. Proctor*, 20 Ohio, n. s. 442.

We have incidentally alluded to this question of the responsibility of trustees for trust funds in former portions of the work. Ante, pt. 2, § 28, pp. 456, 580. See also 2 Redfield on Railw. 521, § 228, where the law is thus laid down. A trustee is ordinarily excused, where he exercises his best judgment, and the fund is lost or diminished by what appears to be a mere casualty. But he is always *prima facie* liable for any such loss, and ultimately, unless he can show very clearly that he was not in fault. By this is understood commonly, that he invested and managed the fund as a prudent man would do with his own. And as the purpose of such fund ordinarily is to raise an

impose the same, or a similar, degree of responsibility with that imposed upon other trustees. We should scarcely find it consistent with the extensive scope and comprehension of this work, to discuss the subject of the responsibility of trustees much in detail. The more recent decisions in regard to the extent of the responsibility of agents, bailees, and all similar trustees, seem to make the question turn more upon the nature of the trust, than the fact of its being gratuitous or for compensation. We should not be prepared, at the present time, to give much countenance to the idea that a trustee of an estate, either real or personal, who has the entire management intrusted to him, or even a general supervision, for the benefit of those interested, is only liable for gross negligence.² But where a solicitor was appointed executor, with liberty to charge for his professional services, he was held not to be entitled to charge for services which appertained to the ordinary duties of an executor.³ But whether the service be gratuitous or not, the duty of the trustee undoubtedly is, to perform it according to his best ability, with such care and diligence as men, fit to be intrusted with such matters, may fairly be expected to put forth in their own business of equal importance.

annuity, it must be invested in some mode, and the most that human foresight can accomplish is to make a wise selection of the different opportunities which offer. 2 Story, Eq. Jur. §§ 1269, 1271; *Clough v. Bond*, 3 Mylne & Craig, 490, 496. But it is said if the trustee mix the fund with his own money, or invest it in an improper stock, he is liable. 2 Story, Eq. Jur. §§ 1270, 1271; *Massey v. Banner*, 4 Mad. 413; *Thompson v. Brown*, 4 John. Ch. 619; *Knight v. Earl Plymouth*, 3 Atk. 480; *Powell v. Evans*, 5 Vesey, 839.

But where, by the terms of a settlement, the trustees had authority to invest in the public securities, it was held a breach of trust to invest the trust fund in railway debentures, not so much because this might not be fairly regarded as a real security, as on account of the uncertain character of the security. *Mant v. Leith*, 15 Beav. 524. In the case of *Ellis v. Eden*, 25 Beav. 482, where one devised to trustees certain securities for the payment of legacies, and directed them to be reduced to cash, excepting, among other things, such as consisted of stock in the foreign funds, it was held that this term included the American stocks, such as the Virginia, Massachusetts, &c., but did not include Boston water scrip or bonds of the Pennsylvania Railway. Permission to invest the funds in the stocks of the colonies or foreign countries will not embrace the railway securities of France although their ultimate payment is guaranteed by the government. *Langdale's Trusts*, L. R. 10 Eq. 39.

² *Briggs v. Taylor*, 28 Vt. 180.

³ *Harbim v. Darby*, 6 Jurist, N. S. 906.

2. The English courts of equity sanction the investment of trust funds under their control, in the public securities of the kingdom, in Bank stock, East India stock, Exchequer Bills, and in annuities, as well as upon mortgage securities upon real estate, in England or Wales.⁴ And it is intimated by Lord Chancellor *Campbell*, in the Court of Chancery Appeal, the Lords Justices hesitating, that if the trustee invest trust funds in securities, such as the court might not have approved or advised, if application had been made for that purpose in advance, he will not necessarily be regarded as guilty of a breach of trust.⁵ And where the fund is not in court, and the trustees act *bonâ fide* and to the best of their discretion, they are entitled to the protection of the court.⁶ But the English courts manifest a preference for mortgage securities over East India stock.⁷ But investment in railway shares is not favored.⁸ But bonds issued under special legislative authority, by a state or city, for the purpose of aiding in the construction of a railway, are public stock, and taxable as such under the Massachusetts statutes.⁹

3. There has been considerable discussion in more than one of the English cases, upon the question, how far trustees will be justified in acting upon the advice of competent counsel. Some of the judges of the equity courts there have seemed to maintain, that such advice is no defence for the trustee, where it turns out, ulti-

⁴ 7 Jur. N. S. pt. 2, 58; *Equitable Interest Soc. v. Fuller*, 1 Johns. & H. 379; s. C. 7 Jur. N. S. 307; *Cohen v. Waley*, 7 Jur. N. S. 937; *Langford*, in re, 2 Johns. & H. 458; *Hurd v. Hurd*, 11 W. R. 50.

⁵ *Colne Valley & Halstead Co.*, in re, 1 DeG., F. & J. 53.

⁶ *Cockburn v. Peel*, 7 Jur. N. S. 810.

⁷ *Ungless v. Tuff*, 30 L. J. N. S. Ch. 784.

⁸ *Harris v. Harris*, 29 Beav. 107.

⁹ *Hall v. County Commissioners*, 10 Allen, 100. In a recent case, *Kimball v. Riding*, 11 Foster, 352, this subject is discussed at length, and the following results arrived at by a judge of extensive learning and experience, Chief Justice *Woods*. 1. Where money is bequeathed to a trustee to be invested and improved according to his best skill and judgment, it is his duty to invest it in safe securities; and his discretion in the selection of investments is not enlarged by the words, "according to the best skill and judgment." 2. If a trustee's authority enables him to invest in stocks, they should appear to have been at that time productive, and to have had a market value depending upon their income, and not upon contingencies. 3. Shares in a contemplated railway are not such. See also *Raynes v. Raynes*, 54 N. H. 201. See ante, chap. xxi.

mately, to be erroneous, and loss or cost to the trust fund is the consequence of following it.¹⁰ But some of the earlier cases seem to us to have assumed a much sounder and wiser view. In *Angier v. Stannard*,¹¹ Sir *John Leach* said, "I am not willing to charge the defendant (the trustee), with the costs of the suit. He has acted *bonâ fide*, under advice which misled him, but upon which he had reason to rely, from the experience and character of the adviser. It is for the interest of society, that a trustee under such circumstances should not be fixed with the costs of the suit." The most that a careful and painstaking man could do in the management of his own affairs, is to act upon his own best judgment, after taking good advice; and if that will not justify the conduct of trustees, such men, surely, will not be willing to undertake the responsibility.

4. There is considerable discussion in the settlement of an account of trustees in a recent case,¹² when former settlements before the same court were overhauled, and a general determination manifested to do justice, in the particular case, irrespective of former proceedings upon the same account, there being no satisfactory proof that the same questions now raised were then understandingly passed upon. It is evident the question here passed upon of opening former interlocutory decrees upon the same account, and the opening of a final decree upon an account, merit very different consideration.¹³

5. It is held in *Blake v. Pegram*,¹² that a trustee who merely credits the interest of the trust fund in his account rendered, and who declines to state how he used the money, cannot be allowed commissions upon the income of the *cestui que trust*, and that when the trustee is charged by the court with items not credited by him in his account, he should be charged with compound interest, where that is requisite to give the *cestui que trust* the same benefit as if the items had been credited at the time they accrued.

¹⁰ *Re Knight's Trusts*, 27 Beav. 49, opinion of Lord Romilly, M. R.; *Doyle v. Blake*, 2 Sch. & Lef. 231, where Lord Redesdale is reported to have said, if the trustee, under the best advice he can obtain, acts wrongly, it is his misfortune, but public policy requires that he should be the person to suffer.

¹¹ 3 My. & K. 592. See also *Devey v. Thornton*, 9 Hare, 232; *In re Pilling*, ex parte Ogle, L. R. 8 Ch. App. 711.

¹² *Blake v. Pegram*, 109 Mass. 541.

¹³ *Baylies v. Davis*, 1 Pick. 206.

CHAPTER XXV.

THE PARTIES TO THE CREATION OF TRUSTS.

1. These consist of the donor, the trustee, and the cestui que trust.
2. The sovereign, corporations, *femes covert*, infants, and aliens, may create trusts; and all others having property and the power of alienation.
3. The leading requisites of the capacities of trustees are, — ability to receive the title; residence within the jurisdiction; and capacity to execute the functions.
4. Further illustration of the last point. Sovereign may become trustee; also, —
 1. Corporations; 2. *Femes covert*; 3. Infants. The state and national government sometimes made trustees by necessity or compulsion.
5. Bankrupts, *cestuis que trustent*, and near relatives may be trustees, but others should be preferred.
6. The number of trustees, and their independence of each other.
7. Any person may be *cestui que trust*, if not against the policy of the law.

§ 69. 1. THE parties to the creation of trusts are three at the least: the donor or settlor, the trustee, and the *cestui que trust* or beneficiary. These terms are so familiar that they scarcely require simplification or definition. The donor or settlor, as the term sufficiently implies, is the creator or founder of the trust. He furnishes the trust fund, whatever it may be, and he declares the terms and conditions upon which the same is to be administered, and the persons, natural or corporate, who are to receive the benefits resulting therefrom. The founder, in the first instance, has the power to appoint the trustee, and to define the mode in which the succession shall be continued. But where no such appointment is made, it is a familiar principle in courts of equity, that the trust will never fail for the want of a trustee, since courts of equity will always supply the defect¹ where one exists.

2. In regard to the donor or settlor several inquiries may arise, both in respect to the persons capable of creating trusts and

¹ Lewin, 21. The definitions here attempted are so simple that no authority is required. They will be found of universal recognition, both in the reported cases upon the subject and among the most approved text-writers. The donor of the trust fund may declare himself trustee of any property of his own in actual possession, and the trust will be enforced if otherwise valid.

the mode of creating the same. In general, all persons not laboring under disabilities in regard to the management and disposition of property may establish trusts. Thus the sovereigns of England, and, by parity of reason, of all other countries, who possess private property and estates, may establish trusts, either public or private.² So corporations may convey their property, so far as they possess any over and above the payment of all just debts and obligations of every kind, for the creation of trusts of any class, which they may see fit to declare.³ Females covert, too, may establish trusts with any property under their separate control or with other property belonging to them, with the consent of their husbands.⁴ And the husband may also convey his interest in the wife's estate upon such trusts as he may declare.⁵ Infants, too, may convey their property upon trusts, and the conveyance will be held voidable only upon coming of age.⁶ And aliens may convey real estate purchased by them, for the creation of trusts, which will be valid until the sovereign shall declare an escheat.⁶ In short, all persons who have property over which they have the power of valid alienation may declare such trusts upon its conveyance as to them may seem meet.

3. The question, Who may act as trustee? may be more conveniently answered by stating who may not act in that capacity. But it may in general be said that the trustee should be capable of holding the legal estate, and therefore an alien cannot, in general, act as trustee of freehold estates.⁷ The

Eaton v. Cook, 25 N. J. Eq. 55. Or the creditor may declare his debtor trustee for another of the debt. *Ib.*

² *Fordyce v. Willis*, 3 Br. C. C. 577, where the right of the crown to establish private trusts is fully recognized. And the subject of appropriating military prize by the sovereign, to whom it exclusively belongs by the English law, is extensively discussed by Lord Chancellor *Brougham*, in *Alexander v. The Duke of Wellington*, 2 Russ. & My. 35.

³ *Colchester v. Lowten*, 1 V. & B. 226; *Attorney-General v. Aspinall*, 2 My. & Cr. 613, where the subject of municipal corporate trusts is extensively discussed.

⁴ *Lewin*, 22, 23.

⁵ *Hanson v. Keating*, 4 Hare, 1; *Donne v. Hart*, 2 Russ. & My. 360; *Duberley v. Day*, 16 Beav. 33.

⁶ *Lewin*, 24, 25.

⁷ *Fish v. Klein*, 2 Mer. 431. But a former decree in trust may be confirmed in the alien, as trustee, or any conveyance made by him may also be con-

trustee should also be one who is amenable to the jurisdiction of the court having the administration of the trust; and therefore a non-resident is not, except for special reasons and by exceptional permission of the court administering the trust, allowed to act as trustee.⁸ And finally the trustee should be one who is capable of performing the duties required by the instrument creating the trust.

4. In England the question has been discussed; how far the sovereign is capable of acting as trustee, which it is not needful here to discuss, as neither the state or national government are created with any view to the office of trustee, even of public charities; and although both may, in some exceptional cases, as that of *Smithson's will*, undertake such duties, in order to save the failure of important public trusts, the cases will be so rare, and will be governed so entirely by the general rules applicable to the subject, that any separate discussion upon this point would be unnecessary.⁹

(1.) It was held, at an early day,¹⁰ that a corporation may be compelled to execute a trust, the same as a private person. And the same rule is maintained by Lord *Eldon*, Chancellor, in a later case,¹¹ and seems now to have become the settled rule of the English law of trusts,¹² notwithstanding the early contention, that, as corporations had no personal consciousness or conscience, they could not therefore be held responsible for the faithful administration of trusts.¹³

firmed, by special act of license or permission or confirmation from the sovereign legislative power. *Ib.*

⁸ Lewin, 27. See also *Meinertzhagen v. Davis*, 1 Coll. C. C. 335.

⁹ Lewin, 27, 28.

¹⁰ *Green v. Rutherford*, 1 Ves. Sen. 462, 468; *Attorney General v. Whorwood*, id. 534, 536.

¹¹ *Dummer v. Corporation of Chippenham*, 14 Ves. 245, 252.

¹² *Attorney General v. St. John's Hospital*, 2 DeG., J. & Sm. 621.

¹³ Lewin, 28, and cases cited; *Attorney General v. The Earl of Clarendon*, 17 Ves. 499; *Same v. Caius College*, 2 Keen, 150, 165. In the latter case Lord *Langdale*, M. R., said, "It is not for me to consider whether corporations or colleges are or are not, in a general view, well or ill qualified to be trustees. The founders of many charitable institutions have thought fit to appoint colleges to be trustees of their foundations; the law has allowed this to be done, and courts of equity are not, in my opinion, at liberty to say that this shall not be done, upon the notion that, when individuals are trustees, there is a greater personal responsibility." It was held in *Sargent v. Cornish*,

(2.) There seems to be no invincible obstacle against a feme covert being made a trustee; but, there being more inconvenience in calling them to account before the proper tribunals, there will always be more or less objection against the selection of married women for the office of trustee. And, by parity of reason, a single woman, being always liable to incur the status of a feme covert, will be more or less objectionable as a candidate for the office of trustee.¹⁴ And as the husband is, from the very necessity of the relation, always responsible for the acts of his wife, even for her breaches of trust, he will naturally exercise a considerable control over her acts; and indeed he must, for the protection of his own interests, constantly exercise a watchful care over her conduct of the trust. This will of necessity, to a certain extent, combine the agency of another with that of the trustee, whenever the office is devolved upon a married woman.¹⁵ In short, it seems to be settled, that whenever the wife holds the office of trustee, the husband must act jointly with her. The money or property, constituting the trust fund, can only properly be delivered upon the joint receipt of the trustee and her husband.¹⁶ The

54 N. H. 18, that a municipal corporation might take and hold money, bequeathed in trust for the purchase and display of United States flags, to the extent of the income, but that towns could not raise money by taxation for the purpose of executing such a trust.

¹⁴ *Buller*, J., sitting for the Lord Chancellor, in *Compton v. Collinson*, 2 Br. C. C. 377, 387, said a married woman's privilege in regard to avoiding her acts is not because "she has less judgment after marriage than she has before. Hob. 95; 1 Ves. Sen. 305. The reasons on which her privileges or disabilities are founded are her own interest, or the interest of her husband, or both." And in *Bell v. Hyde*, Prec. Ch. 328, 330, the Master of the Rolls said, "a woman by her marriage did not lose her understanding or discretion, but rather improved it by her husband's teaching," citing the same case, *Moore v. Hussey*, Hob. 95. And if women should be allowed to exercise these gifts, in the discharge of public functions, we do not see why they might not, with propriety, be selected for many cases of trust, as trustees. But at present the public opinion does not favor it. But in the recent case of *Berkley v. Berkley*, L. R. 9 Ch. App. 720, the court appointed a single woman, aged twenty-seven years, trustee, of the estate of a lunatic, in connection with two others, it being suggested that no other suitable person could be found to accept the office.

¹⁵ *Kingham v. Lee*, 15 Sim. 396, 401; *Smith v. Smith*, 21 Beav. 385; *Drummond v. Tracy*, Johns. Eng. Ch. 608.

¹⁶ *Drummond v. Tracy*, Johns. Eng. Ch. 611.

court, in one case,¹⁷ declined to allow a single woman to propose herself as trustee before the master, as it was not in accordance with the usual practice, and might lead to inconvenience in case of marriage, as "the husband would have the power of interfering with the trust." So that we must conclude that although there is no positive incapacity in the case of a married woman, for becoming trustee, there are, under the present economy of the law of trusts and its administration in the courts of equity, numerous inconveniences which induce the courts to prefer that the administration of trusts should not be embarrassed by any such needless hindrances. But there is no invincible obstacle to the appointment of *femes covert* to be trustees, and it was done in a comparatively recent case,¹⁸ by the Master of the Rolls, after consulting with the other judges.¹⁹

(3.) It seems to have been settled from an early day, that an infant can exercise no office or duty requiring discretion, since in contemplation of law the state of the infant is the same at all ages, and he cannot therefore be presumed to have any discretion or judgment, at any age, or upon any subject.²⁰ It is here said, after argument and consideration by the Chancellor, Lord *Hardwicke*, "There is no precedent, either in a court of law or equity, where it has been held, a power over real estate, executed by an infant, is good; and as I can find no precedent, I will make none."

¹⁷ *Brook v. Brook*, 1 Beav. 531.

¹⁸ *Re Campbell's Trusts*, 31 Beav. 176.

¹⁹ We hope not to offend the fastidious delicacy of any one by suggesting, that we believe there is, at the present time, a more liberal feeling than formerly, among the best-informed and more prudent members of the profession, in favor of allowing single women, at least, an opportunity of executing those mainly ministerial offices in connection with the administration of justice, which cannot offend either against the strictest rules of decorum, or in any sense expose them to a painful or injurious degree of publicity. If this were more encouraged, within reasonable limits, we should expect to hear less of those more offensive claims, which are sometimes asserted in behalf of women not only being admitted to equal privileges in all respects with men, but to those of the same character, in all respects; which seems but another form of demanding a reversal of the laws of nature, so that women may become men, which of course no sane woman expects. But there is some ground to claim that women should not, because they are women, be excluded from all the means of useful employment and independent subsistence.

²⁰ *Hearle v. Greenbank*, 3 Atk. 695, 710; s. c. 1 Ves. Sen. 298.

There are some mere ministerial offices which an infant has been held capable of performing, as to receive money in payment of a debt due him. But his release without payment is of no avail.²¹ And so any act, depending for its validity upon the exercise of judgment or discretion, if performed by an infant, is held not only voidable but absolutely void.²² But the deed of an infant, which operates to pass the title to an estate by delivery, is held only voidable, giving the infant an election to disaffirm the same on coming of full age, provided that shall then be for his advantage.²³ These considerations, and others which might be named, render an infant incompetent to exercise the office of trustee. And an infant is not responsible for a mere negligent or presumptive breach of trust.²⁴ But undoubtedly, as has been said, an infant has no privilege to cheat men, and, if he be old and cunning enough to contrive a fraud, he will not be protected from the consequence of its perpetration by any privilege of infancy.²⁵

5. There is no invincible obstacle to making bankrupts trustees, provided any one chooses to trust them, and they are able to give the required security. And the cestui que trust may be made the trustee for his own benefit; but, as a general rule, there could be no more unfit person, if the object were, as it presumably is in all cases of trust, to maintain the separate existence of the trust fund, and to secure faithful administration of it. To make the cestui que trust trustee would be very nearly equivalent to canceling the trust. The English writers name it as not wholly inadmissible.²⁶ But the present Master of the Rolls, Lord *Romilly*, has declared his repugnance to appointing any near relative of the cestui que trust to be trustee, on the grounds of the frequent breaches of trust which occur in such cases by reason of the necessities or importunities of the beneficiaries.²⁷ And this, of course, would be far less objectionable than to appoint the beneficiary himself to be trustee. But there will no doubt frequent cases arise

²¹ *Russell's Case*, 5 Co. Rep. 27.

²² *King v. Bellord*, 1 Hen. & M. 343.

²³ *Zouch v. Parsons*, 3 Burrow, 1807.

²⁴ *Lewin*, 33; *Whitmore v. Weld*, 1 Vern, 328.

²⁵ *Lewin*, 33; Lord *Thurlow*, Chancellor, in *Beckett v. Cordley*, 1 Br. C. C. 358.

²⁶ *Lewin*, 34.

²⁷ *Wilding v. Bolder*, 21 Beav. 222.

where it is not easy to find a suitable one to accept the office of trustee, unless he is either himself a beneficiary or a near relative to such as are so.

6. It is often discussed by the English writers on the subject, what number of trustees should be appointed. There should generally be more than one, in order to guard against a vacancy, and to secure watchfulness and faithful administration. And the number cannot conveniently be increased beyond three. There are, however, many cases where four or even a larger number have been appointed. And we have always deemed it prudent, and for the interest and security of all, that the trustees should be, as far as practicable, in independent relations towards each other, so as to secure the more complete and perfect watchfulness, and faithfulness of administration.

7. The inquiry who may be the beneficiary or cestui que trust, is not one attended with much uncertainty. In general it may be affirmed that trusts will be upheld in favor of all objects and of all persons, where there is nothing in the transaction against the policy of the law. Thus it seems well settled that a formal trust or an equitable interest may be created in favor of the sovereign;²⁷ or of a corporation, unless there is some requirement of the law that will be thereby evaded, as where such corporations are not allowed to hold lands except by the license of the sovereign, or where, as is not uncommon in this country, corporations by charter are restricted from holding real estate beyond a certain amount in value.²⁸ And as regards aliens, they are incapable of receiving an equitable interest in land until they have become denizens, or have obtained license from the supreme legislative power to hold lands, which in this country may be granted, it is presumed, by the several states. That at least has hitherto been the practical construction. But there is no obstacle to an alien receiving the proceeds of lands directed to be converted into money and distributed among different persons, some of whom are aliens.²⁹ In short, any person may become the beneficiary under a trust, in any mode which will not contravene the policy of the law.

²⁸ Lewin, 35, 36.

²⁹ *Du Hourmelin v. Sheldon*, 1 Beav. 79; s. c. and the Attorney-General made a party, affirmed by Lord *Cottenham*, Chancellor, 4 My. & Cr. 525.

CHAPTER XXVI.

THE MODE OF CREATING TESTAMENTARY TRUSTS.

1. At common law, trusts of lands were created by mere declarations. Exceptions.
2. But by the statute of frauds all trusts of lands must be created or proved by writing signed by the party.
3. Sufficient under the statute if the trust be proved by written declarations, although not created by writing.
4. Trusts as to personalty may be created by oral declarations.
5. Any one who controls the title of land may declare the trusts.
6. Trusts by will, how created.
7. Testamentary trusts must be declared with the same formality, as such property is required to be disposed of by will.
8. Illustration of the operation of the opposite construction.
9. Equity will enforce merely oral trusts on the ground of fraud.
10. Where devise is made upon secret unlawful trust, estate goes to the heir or next of kin.
11. How far courts of equity will enforce oral trusts and confidences, resting in discretion, on the ground of fraud.
12. Voluntary settlement, when enforceable in equity. How perfected.
13. The owner may declare himself trustee for another.
14. And it does not seem important to the creation of a valid voluntary trust that the instrument creating it should be delivered or even published to the trustees or cestuis que trustent. *Sed quare*.
15. Equity will not execute a deed declaring trusts, but upon no valuable or meritorious consideration, merely because it is sealed.
16. Discussion of some of the nice distinctions between the classes of cases bearing upon this portion of the subject.
17. But if fully created cannot be revoked.
18. Relinquishment of dower valuable consideration.

§ 70. 1. THERE seems to have been no particular formality required in the creation of a trust at common law. It might, then, have been done the same as any conveyance of property or contract was made, by mere words of direction on the part of the settlor, and without writing.¹ But it seems always to have been

¹ *Fordyce v. Willis*, 3 Br. C. C. 577, 587, by Lord *Thurlow*, Chancellor; *Parker*, Lord-Chancellor, in *Nab v. Nab*, 10 Mod. 404. In most of the American states the substance of the English law of trusts has been adopted, and the constructions have followed those of the English courts. The Massachusetts statute, ch. 100, § 19, is, "No trust, concerning lands, except such

held that where the title to the estate, real or personal, which formed the basis of the trust, could only be conveyed by an instrument in writing, that a similar formality was if not absolutely requisite to create, or to establish in proof, a trust in regard to such estate, yet no trust could be established by parol in conflict with the writing.² And as the writing presumptively excluded all parol proof, it seems to have been held to exclude all trusts not evidenced by the writing.

2. But by the statute of frauds³ in England it is required that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." This provision of the statute will embrace all estates or interests in land or growing out of land, such as chattels real or terms for years.⁴

3. But trusts resulting from implication or operation of law are expressly excepted from the operation of the statute of frauds. And Lord *Hardwicke*⁵ said, "I am bound down by the statute . . . to construe nothing a resulting trust, but what are thus called trusts by operation of law." And these are here defined to be,

as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or his attorney." It has been held to be sufficient to create the trust that the instrument declaring it should be made at any time subsequent to the conveyance, although the latter may be absolute in its terms. *Barrell v. Joy*, 16 Mass.; 221. But no trust concerning land can be created by parol except such as arises by implication of law. *Walker v. Locke*, 5 Cush. 90. And under a similar statute in New York, the English rule that the trust must be proved by writing, under the hand of the settlor, although originally resting in mere oral declarations, is fully recognized. *Steere v. Steere*, 5 Johns. Ch. 1; *Fisher v. Fields*, 10 Johns. 495. In North Carolina the law in regard to trusts seems to be the same as at common law, before the statute of frauds, and nothing more than parol declarations is required. *Foy v. Foy*, 2 Hayw. 131; *Sentill v. Robeson*, 2 Jones, Eq. 510; *Cloninger v. Summit*, id. 513. But this doctrine of the creation of trusts by mere oral declarations is commonly repudiated in the American states. *Lloyd v. Lynch*, 28 Penn. St. 419. See also *Riddle v. Emerson*, 1 Vernon, 108.

² *Lewin*, 41, 42; *Duke*, 141; *Fordyce v. Willis*, 3 Br. C. C. 577, 587.

³ 29 Car. 2, ch. 3.

⁴ *Lewin*, 43; *Skett v. Whitmore*, *Freeman*, 280.

⁵ *Lloyd v. Spillet*, 2 Atk. 148, 150.

1. Such as where land is conveyed to one person, but the consideration, or price, paid by another. 2. "Where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law." 3. In cases of fraud, where the person holding the title is declared trustee for the party rightfully entitled, "as where the transactions have been carried on *malâ fide*."⁵ These resulting or implied trusts are always proved by oral testimony, and do not require to be evidenced by any writing. And we have one of the most familiar and frequently recurring cases of implied trusts in relation to lands, in cases where the same are conveyed by absolute deed, but in fact only as security for a debt. In such cases the absolute deed is converted into a mortgage, by the application of oral evidence.⁶ This is done upon the principle of its being a fraudulent claim on the part of the grantor, when he asserts an absolute ownership. The statute was held at an early day to save only such resulting trusts as were recognized at the date of the statute.⁷ It is not required under the statute of frauds even, that the trusts in regard to lands should in all cases be absolutely evidenced by writing, at the time of their creation or inception. It will be sufficient if, at the time the courts are called upon to enforce them, there is

⁶ *Strong v. Stewart*, 4 Johns. Ch. 167; *Hutchins v. Lee*, 1 Atk. 447. The subject of implied or resulting trusts is carefully classified in 1 Lomax, Dig. 200, as follows: 1. Equitable or implied trusts, arising out of the conversion of lands into money. 2. Where an estate is purchased in the name of one person, and the price paid by another. 3. Where a conveyance is made of land without any consideration, or the declaration of trusts. 4. Where in the conveyance a declaration is made, declaring the trusts as to a portion of the land, and silent as to the remainder. 5. Where the conveyance is made upon such trusts as shall be appointed, and no appointment is made. 6. Where the conveyance is made upon particular trusts which fail to take effect. 7. Where a purchase is made by a trustee with trust money. 8. Where a purchase is made by partners with partnership funds. 9. Where a renewal of lease is made by a trustee, or some one standing in a fiduciary relation. 10. Where outstanding claims upon an estate are made by a trustee, or tenant, or some one standing in a fiduciary relation to the estate. 11. Where fraud has been committed in obtaining the conveyance. 12. Where the conveyance has been obtained without paying the grantor the price. 13. Where a joint purchase has been made by several, and they have contributed unequally toward the purchase-money.

⁷ *Bellasis v. Compton*, 2 Vernon, 294.

evidence of their present existence, under the hand of the settlor.⁸ But the proof must be entirely satisfactory; and where it consists of different writings, as letters, there must be the clearest evidence that they relate to the subject. It has sometimes been suggested that the probable intention of the statute was that such trust should thereafter be created or declared in writing. Such is clearly the natural import of the terms used; "all declarations or creations of trusts," &c., "shall be *manifested and proved* by some writing," &c. But the construction seems now to be well enough settled, that the proof being in writing will answer the requirements of the statute; and this is so in America as well as in England.⁹ Thus it has been held that it will be sufficient, to establish a trust in regard to lands, that the grantee or trustee make a declaration of trust;¹⁰ or any memorandum to that effect;¹¹ or by a letter under his hand;¹² or by an answer in chancery;¹³ or by recognition in the party's will;¹⁴ or by any other writing duly signed by the party to be charged with the trust.¹⁵ But all judges and text-writers in commenting upon this portion of the statute, and in admitting relaxation after relaxation in regard to the form or character of the writings, wherein a trust is declared or recognized, until it becomes impossible to define any other indispensable requisite of the instrument of declaration or recognition, except that it must be in writing, and signed by the party "entitled to declare the trust," according to the essential words of the statute; these judges and text-writers have seemed to derive some consolation from putting forth some extreme declaration in regard to the degree of certainty required in the result of the evidence. Thus Mr. Lewin¹⁶ says, "the court expects *demonstration* that they relate to the same matter;"¹⁷ and, "nor will the

⁸ *Forster v. Hale*, 3 Ves. 696; s. c. 5 Ves. 315, per Lord *Loughborough*, Chancellor; *Smith v. Matthews*, 3 DeG., F. & J. 139.

⁹ 2 Story, Eq. Jur. § 972; 4 Kent, Comm. 305, and cases cited; Lewin, 45.

¹⁰ *Ambrose v. Ambrose*, 1 P. Wms. 321; *Crop v. Norton*, 9 Mod. 233.

¹¹ *Bellamy v. Burrow*, Rep. t. Talb. 97.

¹² *Morton v. Tewart*, 2 Y. & Coll. C. C. 67.

¹³ *Hampton v. Spencer*, 2 Vern. 288.

¹⁴ *Wilson v. Dent*, 3 Sim. 385.

¹⁵ *Deg v. Deg*, 2 P. Wms. 412.

¹⁶ Trusts, 46.

¹⁷ *Forster v. Hale*, 3 Ves. 708, per Lord *Alvanley*, M. P.; *Smith v. Matthews*, 3 DeG., F. & J. 139.

trust be executed if the *precise nature* of the trust cannot be ascertained.”¹⁸ From all which, and many similar protests on the part of those who have so construed the statute of frauds as to admit all manner of subsequent writings in proof of the existence of a trust, where the terms of the statute seem to exclude all proof except the written declaration of the party creating the trust, made and signed at the time of its creation; we might naturally expect the claim in behalf of the necessity for such relaxation, that it is done only in the interests of justice, and in those cases only where the evidence upon the whole establishes the fact of a trust having been intended, but not declared, in strict conformity with the terms of the statute.¹⁹ It is the old plea so often repeated; “*peccavi, sed in favorem justitiæ.*”

4. It seems to be entirely well settled that the statute does not require trusts as to personalty to be in writing.²⁰ This was the case of a sum of money secured by mortgage of real estate, and the Master of the Rolls said: “But in this case the trust being of personal estate, the case is not within the statute of frauds.”²⁰ And if a trust be once declared as to personalty it is not liable to defeat or modification by any subsequent declaration of the settlor to the contrary.”²¹ And not even a codicil to the settlor’s will can be used to qualify a gift or trust in regard to personalty made by parol declarations of the settlor.²² But the declaration of trust must be final, and not conditional or provisional, in any sense.²³

5. “The person entitled to declare the trust” is not always the same who holds the title to the land in regard to which the trust is declared; but any one who has the control of such title is entitled to declare the trust.²⁴

6. We shall scarcely need to add much here in regard to the creation of trusts, which are strictly of a testamentary character, that is, such as take effect solely in the event of the death of the settlor, and have no force until the occurrence of that event. We

¹⁸ The same cases as in n. 16, and *Morton v. Tewart*, 2 Y. & Coll. C. C. 80.

¹⁹ This is but another instance of the difficulties constantly encountered by the courts in making statutory law express the intent of the framers.

²⁰ Sir *John Leach*, M. R., in *Benbow v. Townsend*, 1 My. & K. 506, 510; *Lewin*, 43, 44.

²¹ *Kilpin v. Kilpin*, 1 M. & K. 520; *Crabb v. Crabb*, id. 511.

²² *Crabb v. Crabb*, *supra*.

²³ *Re Sykes’s Trusts*, 2 J. & H. 415.

²⁴ *Lewin*, 47; *Tierney v. Wood*, 19 Beav. 330.

have already sufficiently indicated the necessity, in such cases, where trusts are expected to be created by last will and testament, that the trusts should be declared in the instrument, which must, of course, be executed in conformity with the requirements of the statute in the place where the property is situated, in the case of real estate; and according to the law of the place of domicile of the testator, or settlor, where the trust concerns personalty.²⁵ There are some few exceptional cases, where trusts may be created by the settlor to take effect at his death, without the formality of declaring them, in his will, duly executed, in conformity with the requirements of the law. One of these occurs in the case of a *donatio mortis causâ*, where the gift is delivered to one person for the benefit of another.²⁶ But this will only extend to personal estate, real estate not being liable to this mode of disposition.²⁷ And the same is true, where one who is to be benefited under a will induces the testator to omit some provision from the will for the benefit of another person by giving an assurance that, if he is made the residuary legatee under the will, he will provide for such other person in the mode desired or stated by the testator; when but for such assurance the testator would have inserted the provision in his will.²⁸

7. With the foregoing exceptions of gifts of personalty *mortis causâ*, and fraudulent suppression or prevention of a will or provision in the same on behalf of another, we find no case of recognized present authority, where a trust has been allowed to be ingrafted upon the provisions of a duly executed will, by means of an informally executed instrument in writing, made after the will, or by a merely oral declaration. There are some cases where a deed poll seems to have been treated as a portion of the will, although executed after it.²⁹ But although a will, by reference to an informally executed paper then in existence, may thereby incorporate it into, and make it a portion of, the will;³⁰ no such rule has ever obtained in regard to papers subsequently executed. And these latter, unless witnessed by the same number of witnesses re-

²⁵ Ante, Vol. I. 164 et seq.

²⁶ Ante, tit. *Donatio Mortis Causâ*, § 42.

²⁷ *Meach v. Meach*, 24 Vt. 591.

²⁸ Ante, Vol. I. pp. 511, 512; *Barrow v. Greenough*, 3 Ves. 151.

²⁹ *Metham v. Devon*, 1 P. Wms. 529; *Inchiquin v. French*, 1 Cox, 1.

³⁰ Ante, Vol. I. pp. 261-268.

quired to render a will valid, are the same, as to the will, as if not witnessed at all, or not made in writing. But any writing, even an informal letter, will have the effect of a codicil to the writer's will, provided it be witnessed by the required number of witnesses, and in the mode pointed out in the execution of wills.³⁰ But it is not admissible in any other mode to declare trusts, which will be binding upon those to whom property is conveyed by will. But where the will gives a legacy or devise to any one upon trust without declaring such trust, and none is afterwards declared; or if so, only in an informal mode, the legatee or devisee will not hold absolutely under the bequest, but he will hold in trust for the testator's heir at law or next of kin, the bequest virtually lapsing by reason of being left incomplete.³¹ But if the legatee or devisee be not named as trustee in the will, no informal attempt to declare a trust in behalf of the bequest will affect the title of such legatee or devisee.³² And where the law requires a will of personality to be executed with the same formalities as a will of real estate, or with any other formalities, it will require testamentary trusts in regard to such property to be established by the same formalities.³³

8. Any other rule in regard to testamentary trusts would be liable, and very likely, in practice, to trench gradually upon the prescribed formalities in the execution of wills. For if trusts of a testamentary character might be declared by the testator by mere oral declarations, or by writing not executed with the same formalities required in the execution of wills, men's final dispositions would, in many cases, be made up largely of such acts and declarations as the cupidity of claimants and the recklessness or indifference of witnesses might dictate. And in many instances formal wills might be made merely as the initiative towards the final disposition. This portion of the subject is well illustrated by the rights of executors. Before the statute,³⁴ declaring the executor shall take the undisposed residue of the estate as trustee for the next of kin, he took beneficially, and no averment or proof was admissible to show a contrary intent. But if from any circum-

³⁰ *Muckleston v. Brown*, 6 Ves. 52.

³² *Adlington v. Cann*, 3 Atk. 141; *Lewin*, 49, and cases cited.

³³ *Johnson v. Ball*, 5 De Gex & Sm. 85. See *Warriner v. Rogers*, L. R. 16 Eq. 340.

³⁴ 11 Geo. 4 and 1 Wm. 4, c. 40.

stance, as the giving the executor a special legacy, a presumption arose, that he was not to have the surplus beneficially, he might rebut this presumption by proof, and the next of kin was also at liberty to fortify it by counter proof.³⁵ But under the old law if the residue of the estate was given to the executor as trustee, the law implied that this was for the next of kin, and no contrary proof was admissible.³⁶ And under the English statute, where there are no next of kin, it is held the statute has no operation, and the executor will hold the residue under the old law as against the Crown. But if the executor is declared a trustee in the will, and there is no next of kin, the Crown will take.³⁷ And where it appears from the whole will, that the executor was intended to take beneficially, he will be allowed to hold the estate notwithstanding the statute.³⁸

9. The cases where the courts of equity have interposed to establish testamentary trusts on the ground of fraud, and by means of parol evidence merely, are considerably numerous, and rest upon the same basis as other exceptions to statutory provisions, where fraud has been attempted under the shield of the statute. Thus where the heir induces his ancestor, who has the power of disposing of the estate by will, to believe that if the same is left to descend to him he will provide in a particular manner for the mother, wife, or child of the ancestor, whereby he is induced to forego any provision for such person, a court of equity, notwithstanding the statutory provisions in regard to wills, will compel the heir to make the provision represented by him, and in conformity with his engagement, express or implied.³⁹ So where the father devises to the younger son, upon his assurance to pay the elder son £10,000, the court will compel the devisee to declare the understanding, and to perform it, notwithstanding he claims the defence and protection of the statute.³⁹ We have already alluded to this exception,⁴⁰ and it may be stated in general terms, that where any one benefited by the provisions of the will has induced such provisions by promises or assurances that he would

³⁵ Ante, Vol. I. 641 ; Vol. II. 490, 491.

³⁶ *Langham v. Sanford*, 17 Ves. 453 ; s. c. 19 Ves. 641.

³⁷ *Read v. Stedman*, 26 Beav. 495.

³⁸ *Harrison v. Harrison*, 2 H. & M. 237.

³⁹ Lord *Eldon*, Chancellor, in *Stickland v. Aldridge*, 9 Ves. 516, 519.

⁴⁰ Ante, § 27.

perform certain desires of the testator towards others, which are consequently omitted from the will, a court of equity will enforce the undertaking or assurance as a trust.⁴¹

10. It sometimes happens that land or other property is devised or bequeathed in a general way, but with a secret agreement or confidence on the part of the devisee or legatee that he will apply it to some unlawful purpose, or one which the law will not justify. In such cases, where, for instance, the secret trust is to apply lands so devised in a manner in conflict with the statutes against mortmain, the courts of equity will compel the devisee to disclose the secret trust or confidence between himself and the testator, and, if it proves to be one which the law does not justify, will declare the devisee a trustee for the heir at law, and compel him to convey accordingly.⁴² And where the devise is to several, as tenants in common, to some of whom the testator communicates his unlawful trust or confidence and not to others, the devise may be valid as to the latter and not as to the others.⁴³ But if no trust or confidence was created between the testator and the devisee, the devise will not be held void because the devisee, of his own mere motion, may be disposed to carry out what he may conjecture to have been the desire of the testator.⁴⁴

11. And it seems that where real estate is devised to one with an understanding that the devisee shall apply so much as in his discretion he deems proper to purposes of charity, the devisee may be compelled to disclose the understanding, and whether or no he has exercised the discretion, and, if so, how much he has designated for the charitable purpose. And if the charitable purpose is one not according to the policy of the law, the court will decree the portion so designated to be conveyed to the heir at law.⁴⁵ And if the devisee deny the trust, it may be established by proof aliunde.⁴⁶ And even where the devise is general, giving the beneficial interest to the devisee, but with the understanding that the devisee shall apply the estate to such trusts as the testator shall thereafter

⁴¹ *Kingsman v. Kingsman*, 2 Vernon, 559; *Lewin*, 51; *Barrow v. Greenough*, 3 Ves. 152; *Chamberlain v. Agar*, 2 Ves. & B. 259.

⁴² *Adlington v. Cann*, *Barnardiston*, 130, where the question is discussed but not decided. *Lewin*, 52; *Muckleston v. Brown*, 6 Ves. 52; *Stickland v. Aldridge*, 9 Ves. 516.

⁴³ *Tee v. Ferris*, 2 Kay & J. 357; *Mors v. Cooper*, 1 J. & H. 352.

⁴⁴ *Wallgrave v. Tebbs*, 2 K. & J. 313; *Lomax v. Ripley*, 3 Sm. & G. 48.

⁴⁵ *Muckleston v. Brown*, 6 Ves. 52, 69. ⁴⁶ *Pring v. Pring*, 2 Vernon, 99.

declare, and he dies without making any such declaration, it has been held that the heir at law is entitled to a conveyance of the estate from the lessee.⁴⁷ But where the devise is to persons as trustees, and they are informed by the testator that his purpose is that the devisee shall hold the same for the benefit of certain persons whom he names, and the devisees agree to hold the estate for the benefit of such persons, a question has been made how far the courts of equity will compel the devisees to execute such oral declarations of trust. It seems clear, upon principle, that it cannot be done, unless upon the ground of some attempted or intended fraud on the part of the devisees. But even where the devisees decline to execute the trusts, they merely hold the estate by a resulting trust for the benefit of the heir at law. And that being the legal duty resulting from the will, it would seem that the oral understanding or declaration of trusts should not be held in any sense operative.⁴⁸ But the decisions of the courts certainly seem to incline towards the enforcement of such oral declarations of trust as against the devisee or legatee.⁴⁹ But the early cases, so far as personalty is concerned, do not stand upon the same basis as those decided since the statutes requiring wills of personalty to be executed with the same formalities as those affecting the realty.

12. How far, and precisely at what point, a voluntary trust may be said to be perfectly created, has sometimes been made a question. The rule seems to be, that so long as there is no consideration for the settlement, either good or valuable, and the matter rests in contract merely, a court of equity will not interfere on behalf of a mere stranger.⁵⁰ But where there has been an actual transmutation of the possession of the estate, whether real or personal, and the matter, although voluntary, no longer rests in *fieri*, as it is called, the courts of equity will grant relief to a trustee under a voluntary settlement, the same as if made upon consideration of natural duty and affection, as if for the support of a wife or child, or the same as if made upon a pecuniary consideration.⁵⁰

⁴⁷ *Muckleston v. Brown*, 6 Ves. 52; Vice-Chancellor *Turner*, in *Russell v. Jackson*, 10 Hare, 214.

⁴⁸ *Lewin*, 54.

⁴⁹ *Pring v. Pring*, 2 Vern. 99; *Podmore v. Gunning*, 7 Sim. 644.

⁵⁰ Lord *Eldon*, in *Ellison v. Ellison*, 6 Ves. 656, 662. See *Wheatly v. Purr*, 1 Keen, 551; *Collinson v. Patrick*, 2 id. 123.

But under the English statute,⁵¹ it seems that a settlement upon a wife or child, without the addition of any pecuniary consideration, will become inoperative, as against a subsequent purchaser for valuable consideration.⁵² And it is considered, that, so long as any act remains to be done on the part of the settlor, the trust cannot be regarded as perfected.⁵³ To constitute a perfected trust as against the settlor, it may be said the gift must be divested from the donor, and vested in possession of the donee or some third party for him, the same as a gift mortis causâ or inter vivos.⁵⁴

13. It seems to be settled in the English courts of equity, that one who is the owner of property in possession may declare himself to be the trustee of that property for the benefit of another, and communicate such declaration to the cestui que trust, so as to constitute himself the trustee of the same, and the court will execute the trust:⁵⁵ and a trust of choses in action may be created by the declaration of the trust and a delivery of the securities; and this may be done by oral declarations, whether the intention be to have the trust created absolutely and irrevocably in the present time, or only as a gift mortis causâ in the event of the death of the donor by his then present illness.⁵⁶ But a mere assignment

⁵¹ 27 Eliz. c. 4.

⁵² *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 98. See also *Price v. Price*, 14 Beav. 598; *Bridge v. Bridge*, 16 id. 315; *Scales v. Maude*, 6 DeG., M. & G. 43; *Airey v. Hare*, 3 Sm. & Giff. 315. The American rule in regard to subsequent purchasers for valuable consideration being able to avoid a prior voluntary conveyance of the same estate may be regarded as somewhat different from the English rule. The English rule treats the presumption of fraud in all cases of voluntary conveyances of land as conclusive under the statute, and that the same is consequently void as to subsequent purchases for value. *Doe v. Manning*, 9 East, 59. And this presumption is allowed to operate even in the case of a settlement upon a child, where the settlor was not indebted at the time, or had ample property besides to meet all his debts. But the American rule allows such presumption of fraud to be rebutted by circumstances or external proof. *Cathcart v. Robinson*, 5 Pet. U. S. 269; *Jackson v. Town*, 4 Cow. 599; *Brackett v. Waite*, 4 Vt. 389; *Viney v. Abbott*, 109 Mass. 300.

⁵³ *Cotteen v. Missing*, 1 Mad. 176.

⁵⁴ *Tait v. Hilbert*, 2 Ves. Jr. 111. See ante, *Gifts Mortis Causâ*, § 42; *Dapple v. Corles*, 11 Hare, 183; *Jones v. Lock*, Law Rep. 1 Ch. App. 25.

⁵⁵ *Pye, Dubost, ex parte*, 18 Ves. 140; *M'Fadden v. Jenkyns*, 1 Hare, 458; *Thorpe v. Owen*, 5 Beav. 224; *Steele v. Waller*, 28 Beav. 466; *Lewin*, 57, and cases cited n. (a).

⁵⁶ *Roberts v. Lloyd*, 2 Beav. 376; *Gray v. Gray*, 2 Sim. n. s. 273.

without notice to the trustees, or a delivery of the choses in action to the trustees, or any one on their behalf, will not be sufficient to create a trust.⁵⁷ And merely equitable interests are capable of being dealt with in the same manner as legal interests in the creation of trusts.⁵⁸

14. In a recent case⁵⁹ before the Court of Chancery Appeal, where a person entitled to an equitable reversionary interest in a sum of stock made a voluntary assignment of it to trustees, and no notice of such deed had been given either to the trustees named in it, or to any person interested under it, or to the original trustees of the stock, and the assignor retained the deed, and subsequently destroyed it and made a different disposition of the fund by will, the same standing in the names of the original trustees at the decease of the assignor; it was nevertheless held, that, unless the deed could be successfully impeached, on the ground of fraud, mistake, or surprise, it operated as an effectual disposition of the fund, notwithstanding the absence of notice, and the retention and destruction of the deed by the assignor. The case is a somewhat remarkable one, and Lord Justice *Turner* expresses satisfaction that it had arisen, on account of its doubtful character and the importance of having it settled. It seems somewhat remarkable that it should not, on account of its novelty and doubtfulness, have been brought before the House of Lords by appeal. It seems to us the decision of the Master of the Rolls, which is here reversed, is the more wholesome and rational doc-

⁵⁷ *Meek v. Kettlewell*, 1 Hare, 464.

⁵⁸ *Sloane v. Cadogan*, cited in *Lewin*, 59, from *Appendix to Vendors and Purchasers*, by Lord St. Leonards. See also *Ellison v. Ellison*, 6 Ves. 656. And the person beneficially interested in property held by trustees, may create new trusts in the same trustees in behalf of third persons. *Rycroft v. Christie*, 3 Beav. 238; *M'Fadden v. Jenkyns*, 1 Hare, 458. Or the assignment may be made to a stranger for his own benefit. *Cotteen v. Missing*, 1 Mad. 176. And notice to the trustees of the creation of a trust seems not essential, provided there be an effectual delivery of the thing, and perfecting of the assignment. *Way's Trusts*, 2 DeG., Jones & Sm. 365; *Lewin*, 60, and cases cited. But an imperfect or incomplete assignment or gift of personalty cannot be upheld as a declaration of trust. *Heartley v. Nicholson*, L. R. 19 Eq. 233.

⁵⁹ *Way's Trust*, 2 DeG., Jones & Sm. 365. And the present Lord Chancellor *Hatherley*, then Vice-Chancellor *Wood*, seems to have taken the same view in *Donaldson v. Donaldson*, Kay, 711. And the same doctrine is declared in *Fletcher v. Fletcher*, 4 Hare, 67, except that in this case the settlor did not destroy the deed in his lifetime.

trine upon the subject; and we should have regarded it, upon the facts, not only as a case resting in contract, in fieri strictly, but one where even the purposes and intent of the settlor seem not to have been fully formed. We should not expect ever to meet any such decision in the American courts; and we should certainly regard any counsellor as a bold man, who would presume to bring any such case, if one should ever arise here, before the courts. But the English Lords Justices, *Knight-Bruce* and *Turner*, very able, discreet, and prudent judges, seem not to have regarded it as a case of much doubt. We might have entertained the same opinion, but in the opposite direction.

15. It has sometimes been supposed that, as contracts under seal imply consideration, and are not impeachable even by proof that none in fact existed, equity will execute trusts declared by instruments under seal, the same as if made upon valid and meritorious consideration. But the doctrine seems well established in the English chancery, that a court of equity will not carry into execution a voluntary deed, declaring trusts, without either a valuable or meritorious consideration.⁶⁰ But the class of cases embraced in the next preceding section seem to go upon the ground that the deed, by operation of law, had actually transferred the title in the fund, so that it ceased to rest merely in covenant, or in fieri, and had become already perfected, and that therefore there was no demand upon the court to execute a voluntary trust resting in mere covenant or contract. The distinction is somewhat nice, and would be found, we apprehend, not a little difficult in its practical application. It seems to us, the cases attempted to be ranged under the category of the cases referred to in the last section impinge somewhat upon the ground assumed in those referred to in the present one. They certainly come very nearly into the same practical position.

16. And there is another well-established rule in the law of trusts, which seems to require consideration in this connection. There must be a present, perfected intention of creating an interest in the cestui que trust, in the present tense and not upon the happening of some future event, as the death of the settlor. Thus in the case of *Wheatley v. Purr*,⁶¹ where the testatrix had funds in

⁶⁰ *Colman v. Sarel*, 3 Br. C. C. 12. See also *Story, Eq. Jur.* §§ 793, 793 a et seq. and cases cited; *Meek v. Kettlewell*, 1 Hare, 464, 473, 474.

⁶¹ 1 Keen, 551.

the bank transferred to the joint names of herself as trustee and the cestui que trust, and took a promissory note from the bankers, payable to herself as trustee for the cestuis que trustent, with interest, and after her decease the executors received the money, it was decided that it was so completely impressed with a perfected trust, that equity will enforce the same against the executors. But in another case,⁶² the testatrix drew a check upon her bankers for £150, in favor of A., and verbally directed A. to apply the same, or so much as might be required to make up the difference to one of the legatees in her will between the sum named, £100, and the price of a £100 share in a certain railway, the testatrix informing A. that she intended to give the share instead of the £100, but did not think it necessary to alter her will. The bankers gave credit to A. for the £150. But the court held that no trust in regard to the £100 was created in favor of the legatee. Vice-Chancellor *Wigram*, in giving judgment, said :⁶³

⁶² *Hughes v. Stubbs*, 1 Hare, 476. See also *Smith v. Warde*, 15 Sim. 56.

⁶³ "The result of the cases is, that the Court looks into the nature of the transaction, and determines from the nature of the transaction what the effect of it shall be in divesting the owner of the property to which it relates. The question which in the present case I have to solve is, whether by force of the transaction upon which Mrs. Gelling relies she acquired during the life of the testatrix an equitable interest in the money in the hands of Cropper, Benson & Co.; and whether the testatrix in her lifetime was deprived of her original property in, and dominion over, that money, to the extent of the interest so acquired by Mrs. Gelling; or, in other words, whether, if the testatrix had changed her intention respecting the legatee, and had called upon Cropper, Benson & Co., and John Cropper, to pay the money to her, the testatrix, — Mrs. Gelling could, in that case, having discovered the transaction, have maintained a bill to have the money brought into court and secured for her benefit during the lifetime of the testatrix, until it should appear whether the testatrix had by legacy in her will given Mrs. Gelling an interest not less beneficial than that which the testatrix intimated her intention to give; or whether the transaction in question was any other than a private arrangement of the testatrix for her own convenience, with an agent constituted by herself, and that agent a trustee for herself and not for Mrs. Gelling. I cannot bring myself to doubt as to the conclusion to which I ought to come upon such a question. There was no antecedent agreement with, or promise to, Mrs. Gelling, leading to the conclusion that the testatrix, by placing the money in the hands of Cropper, Benson & Co., to the credit of John Cropper, was perfecting or performing such antecedent agreement or promise. There does not appear to have been any subsequent communicating of the facts in the lifetime of the testatrix,

From this extract from the opinion of the learned vice-chancellor, it is apparent that the cases, where the court will regard property impressed with a trust and those where it holds that no such result has been perfected, are often very similar. And the argument of the learned judge here, as to the effect to be given to the facts, that the settlor had not communicated his intention to create a trust, either to the trustees or the cestuis que trustent, and that he had retained the instrument in his own hands, and, as in some cases, had actually destroyed it before his death, and made other disposition of the property, might fairly be regarded in the cases which we have already discussed,⁶⁴ as quite sufficient, when taken in combination, to induce all courts to con-

from which the Court might have drawn the same conclusion as from an antecedent agreement or promise. As subsequent communications may not be necessary to the completion of a voluntary trust, the absence of such circumstances leaves me nothing but the transaction itself from which to draw a conclusion. It would be sufficient in this case to say that there is nothing in the transaction which necessarily implies that the testatrix (intending only a benefit to take effect after her death, and in connection with her will) meant to place this disposition of her property out of her control in her lifetime. But the transaction, to say the very least of it, is capable of a construction unfavorable to the claim of Mrs. Gelling; and I think the true inference from it is opposed to that claim. I am of opinion that the proper inference to be drawn from it is, that the testatrix intended the arrangements to supply the place of an alteration in her will and to stand upon the same footing as a will. All the observations of Lord *Cottenham* in *Bill v. Cureton* appear to me to apply to a case like the present. It was said that if I came to this conclusion I should overrule the case of *Wheatley v. Purr*. But that case may stand upon different grounds. It will be seen from evidence, 3 Sim. 14, that the intention there was to give a present interest to the object of bounty; directions were given accordingly, and the mode of carrying it into effect was adopted by agreement between the parties. In that respect *Wheatley v. Purr* resembles *Ex parte Pye*, *Ex parte Dabost*, where instructions having been given to buy stock in the name of another person, the party purchased it in the name of the donor, and Lord *Eldon* thought the circumstances were enough to constitute the original owner a trustee. I should be greatly surprising the party if I were to hold, that by merely placing money in the hands of *Cropper, Benson & Co.*, to the credit of *John Cropper*, in order that the latter should apply it in a certain manner in connection with her will, she had conferred on Mrs. Gelling a present interest in the money, excluding herself, and entitling Mrs. Gelling to have the money secured for her. The cases on this subject are necessarily of difficulty, but the conclusion to which I feel bound to come is, that the testatrix did not part with her property in the sum in question, or create any trust for the legatee."

⁶⁴ Ante, pl. 9.

sider that the proof was entirely satisfactory to show that no definite and perfected trust had been made, or was intended to be made, by the alleged settlor.

17. It is entirely well settled that even a voluntary settlement or trust, when once perfected, is not subject to revocation by the settlor, unless the instrument creating the trust contains a provision for revocation, and then only in conformity with the terms of such revocation.⁶⁵

18. It is well settled that when the wife relinquishes her claim of dower in the husband's estate in consideration of a settlement made or promised, it is a valuable consideration to the extent of the value of the right relinquished.⁶⁶

⁶⁵ Sewall v. Roberts, 115 Mass. 262.

⁶⁶ Burwell v. Lumsden, 24 Gratt. 443.

CHAPTER XXVII.

TRUSTS AS LAWFUL OR UNLAWFUL.

SECTION I.

LAWFUL TRUSTS.

1. Trusts not affected by the embarrassments of technical rules of law affecting legal estates. More fully defined.
2. Trusts for accumulation already sufficiently discussed.

§ 71. 1. TRUSTS are not embarrassed by any of those merely technical rules which apply to estates at law; as that a fee, except by executory devise, cannot be limited upon a fee; or that a freehold contingent remainder must be supported by a freehold particular estate. But in equity the intention of the settlor of a trust will be carried into effect so far as it is not substantially in conflict with the essential policy of the law. And although in strictness a chattel interest cannot be limited to successive takers, there is no difficulty, as we have before seen, in effecting this by way of trusts.¹ Under this head little more need be said than that all trusts are lawful, which are not in conflict with some positive rule, or settled policy of the law; and, as a general rule, will be carried into effect according to the intention of the settlor.²

2. The subject of trusts for accumulation, and the extent to which they are recognized as valid in England and the United States, has been sufficiently discussed in former portions of this work, and we need only refer to what is there said.³

¹ Ante, Vol. 2, § 17, pl. 24 et seq.; pp. 271-274; id. 280, 345.

² Lewin, 67-76.

³ Ante, Vol. 2, § 17, pl. 30; § 36, pl. 71, n. 172; § 37, pl. 1 et seq.

SECTION II.

UNLAWFUL TRUSTS.

1. Trusts for illegitimate children not born, and of lands in mortmain or for aliens, not upheld.
2. So trusts for charity in mortmain, to create perpetuity, providing against alienation or the benefit of creditors, not upheld.
- 3 and n. 11. Trusts for maintenance, how shaped in order to be protected from alienation and from creditors.
4. Trusts in subversion of religion and morality. The remedy in courts of equity.
5. Bequests to keep tombs in repair, and for the care of memorials in churches.

§ 72. 1. ALL trusts calculated to effect a purpose in conflict with the settled policy of the law will be held unlawful, and courts of equity will not aid in carrying them into effect. Thus trusts for the benefit of illegitimate children, *to be thereafter born*, cannot be maintained.¹ But illegitimate children, already born, may take under bequests, or may demand the execution of trusts on their behalf, as we have before seen.² And estates cannot be devised in trust in mortmain or for the benefit of aliens, any more than they could be conveyed directly, since the evil is the same in both cases.³ The vice-chancellor said the court would not aid an alien in obtaining possession of land, "when it would know at the same time that he could not have any benefit from it. There would be no violation of any principle of justice in refusing to let him have property which he could not hold."

2. So trusts for charities in conflict with the statutes against mortmain, or in any other way in conflict with the policy of the law, will not be upheld, as we have before seen.⁴ And all trusts to create perpetuities are void, as we have before sufficiently shown.⁵ And trusts providing against the alienation of the interest of the cestui que trust, or a trust with provision that creditors shall have no interest in the fund, will be held inoperative as to

¹ *Wilkinson v. Wilkinson*, 1 Y. & Coll. C. C. 657; *Medworth v. Pope*, 27 Beav. 71; *Howarth v. Mills*, Law Rep. 2 Eq. 389.

² *Ante*, Vol. 2, § 2, pl. 13 et seq., pp. 23-26.

³ *Burney v. Macdonald*, 15 Sim. 6.

⁴ *Ante*, Vol. 2, § 36, pl. 23 et seq.

⁵ *Ante*, Vol. 2, § 38.

these limitations.⁶ But we have seen that it is practicable to so convey property, either real or personal, that the title shall revert to the donor, or his heirs or next of kin, upon the donee or grantee becoming bankrupt, or attempting to convey the same.⁷ This portion of the subject is sufficiently discussed in other parts of the work.⁸

3. But trusts providing for the support and maintenance of the cestui que trust, his wife and children, or, if the trustees should think proper, to permit the income to be received by the husband during his life, without power, on his part, to charge the same, have been upheld; and after the bankruptcy of the husband the income will be applied according to the direction of the trust, and not go to the assignees, except what remained over and above the maintenance of the wife and children. The Master of the Rolls here said: "I am of opinion, that so long as the wife and children were maintained by Jones (the husband), the trustees had a discretion to give him the whole income; but that it was their duty to see that the wife and children were maintained. The assignees to take every thing subject to what is proper to be allowed for the maintenance of the wife and children, and it must be referred to the master to settle a proper allowance."⁹ And a trust for the benefit of the settlor's son for life, and in case he should become bankrupt, or be discharged under any insolvent act, that the trustees may apply the income towards the maintenance of the son, his wife and children, or for their use and benefit, in their discretion, was upheld, and it was declared that, after the discharge of the son under the insolvent law, his life estate was forfeited, and that all income prior to that date vested in the assignees, but thereafter the trustees might exercise their discretionary powers in favor of the insolvent, his wife and children collectively, or of any of them, to the exclusion of others, and to whatever extent it should be exercised in favor of the insolvent, the benefit would inure to the assignees.¹⁰ But where the trust is for the general benefit of the cestui que trust, and the deed contains no clause of cesser or forfeiture upon the happening of his bankruptcy or insolvency, or it being seized by creditors, or assigned by the cestui

⁶ *Snowdon v. Dales*, 6 Sim. 524; *Lewin*, 79, and cases cited.

⁷ *Ante*, Vol. 2, § 16, pl. 12 et seq.; § 18, pl. 54 et seq.

⁸ *Ante*, Vol. 2, §§ 16, 18.

⁹ *Page v. Way*, 3 Beav. 20.

¹⁰ *Lord v. Bunn*, 2 Y. & Coll. C. C. 98.

que trust, the authorities all seem to concur in the result that no language of the settlor, by which its alienation by the cestui que trust, or seizure by his creditors, is attempted to be foreclosed and effectually hindered, can be allowed to have that effect.¹¹

4. So trusts, which have for their object the subversion of

¹¹ *Youngehusband v. Gisborne*, 1 Coll. C. C. 400. The Vice-Chancellor, *Knight-Bruce*, here takes very decided ground. He says, "I wish to be understood as not giving any opinion whether the two cases cited by Mr. Beales, *Two-penny v. Peyton*, 10 Sim. 487, and *Godden v. Crowhurst*, id. 642, are or are not materially distinguishable from the present. If they are not so, then I must respectfully dissent from them. In the present case, I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually."

The cases are numerous upon this point, but mostly seem to range themselves under the distinction pointed out in the text. The point of this distinction seems to be, that if the estate is once effectually secured to a person for his own use, and under his own control, whether it be given directly, or through the intervention of trustees, it is not possible for the donor or settlor to control the use of such estate, either by the donee or his creditors, except by providing that the title shall cease upon the happening of the event desired to be guarded against, such as bankruptcy, insolvency, or levy upon the same by creditors, or whatever else it may be. *Hallett v. Thompson*, 5 Paige, 583, is a leading American case upon this point, and the summary of the English law given here by the learned Chancellor, *Walworth*, will be of interest. "In *Graves v. Dolphin*, 1 Sim. 66, Sir *John Leach* held that an annuity given by a father to his son, passed under an assignment of the commissioners in bankruptcy, although the estate upon which the annuity was charged was in the hands of trustees; and the testator had expressly declared, in his will, that the annuity was given for the personal maintenance and support of his son, during the whole term of his natural life, not liable for his debts, nor subject to any charges or incumbrances of his; that it should be paid into his hands only; and that his receipt alone should be a good and sufficient discharge for the same. His Honor said the testator might have made the annuity determinable upon the bankruptcy of his son, but that the policy of the law did not permit property to be so limited, that it should continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy. A similar decision was made by Lord *Eldon*, in *Brandon v. Robinson*, 18 Ves. 428. The Master of the Rolls decided the same point in favor of an assignee under the insolvent debtor's act, in the case of *Green v. Spicer*, 1 R. & M. 395, although the trustee, in that case, had a discretion as to the time and manner of applying the rents and profits of the trust property to the support and maintenance of the cestui que trust; the whole beneficial interest in the rents and profits being vested in such cestui que trust."

religion, morality, or government and social order cannot be upheld.¹² And where a trust is unlawful or fraudulent as to third parties, the courts of equity will neither execute it in favor of the parties intended to be benefited, nor will they lend their aid to the donor or settlor in recovering the estate.¹³ But it seems that the court will interfere in behalf of the parties attempted to be defrauded or wronged by unlawful trusts, and set them aside, and afford such other relief as may be consistent with the rules of law applicable to the facts in the case.¹⁴ And in some cases where property has first been directed to be applied to an unlawful use, or one the law will not uphold, and thereafter to revert to the settlor or his heirs, the courts have, on the bill of the settlor, decreed the property to him, treating the unlawful trust as a nullity.¹⁵

5. A devise of real estate for keeping a tomb in repair, forever, out of the income, is void, as tending to create a perpetuity.¹⁶ But the Vice-Chancellor here held that such a bequest is not charitable, and, provided it do not involve any disposition of real estate in perpetuity, is not unlawful. And it has often been held that a trust for keeping in repair a painted window or monument in a church, is entirely valid. This may be regarded as a charity, since the monument, being a part of the church, the keeping the same in repair comes within the express words of the statute of charitable uses¹⁷ for the "reparation of churches."¹⁸ We might discuss the cases upon the subject of unlawful trusts more in detail, but enough has been said to indicate the principles and rules of law applicable to the subject, and we shall not now attempt more.

¹² Lewin, 84, 85; *Thornton v. Howe*, 31 Beav. 14.

¹³ Lord *Hardwicke*, in *Cottington v. Fletcher*, 2 Atk. 155; Lord *Eldon*, in *Muckleston v. Brown*, 6 Ves. 52, 68; Lewin, 85, and cases cited.

¹⁴ *Muckleston v. Brown*, 6 Ves. 52, 68, by Lord *Eldon*, Chancellor.

¹⁵ *Wilkinson v. Wilkinson*, 1 Y. & Coll. C. C. 657.

¹⁶ *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Rickard v. Robson*, 31 Beav. 244; *Thompson v. Shakespeare*, Johns. Eng. Ch. 612; 1 DeG., F. & J. 399; *Fowler v. Fowler*, 10 Jur. N. S. 648; s. c. 12 W. R. 972.

¹⁷ 43 Eliz. c. 4.

¹⁸ *Hoare v. Osborne*, Law Rep. 1 Eq. 585.

CHAPTER XXVIII.

IMPLIED TRUSTS.

1. Trusts may be implied in law. Instances.
2. The effect of precatory words and uncertainty.
3. Where words create partial trust, remainder goes to trustee beneficially.
4. Conditions construed as creating trusts.
5. Covenant upon consideration, or contract of sale will create trusts.

§ 73. 1. THE general rules of the law, as administered in courts of equity, will enable those courts to carry into effect any trust for the benefit of another, where the same is fairly implied, either in law or as matter of fact. Those trusts which are implied in law, viz., such as result from property coming to one's possession for a purpose, which in some way fails, and the property still remains in the hands of the trustee, — in such cases the law implies a trust in favor of the person creating the trust, or of his heirs. So, too, where one person delivers money or other property to another, for the use of a third person, this will create the simplest form of trust; but it is rather express than implied.¹

2. But the most numerous class of implied trusts are such as result from the use of precatory words in regard to the application of personalty bequeathed, or of the income of real estate devised. This subject has been examined and the cases discussed, very much at length, in a former portion of this work,² to which we must refer the reader, both for what is said in regard to the proper construction of words of wish, desire, and recommendation, embracing the whole class of precatory words, and also the degree of certainty required to create such an obligation as the courts will carry into effect.

3. Where the words create only a partial trust for the benefit of another, the devisee will hold the surplus or remainder in his own right.³ Of this character are bequests to one, the better to enable him to maintain his family, or wife and children;⁴ or where

¹ 2 Story, Eq. Jur. §§ 1195, 1196.

² Ante, Vol. 2, §§ 24, 25.

³ Wood v. Cox, 1 Keen, 317; 2 My. & Cr. 684.

⁴ Benson v. Whittam, 5 Sim. 22; Fox v. Fox, 27 Beav. 301.

the trust is more clearly expressed, as "for the education and advancing in life of his children."⁵ In all such cases, where the terms are sufficiently definite to create a trust, the person charged with the execution of the trust is the one entitled to receive the money,⁶ and is considered in the light of the guardian or committee for a lunatic, entitled to disburse the fund in furtherance of the object, so long as he is competent to administer the trust.⁷ The children in such cases are not considered as justly entitled to participate in the benefits of the trust after they cease to form a portion of the family, as where they are married or have become of age, or are otherwise settled in life. But it seems to be considered, that so long as the children form part of the family, they are justly entitled to participate in the benefits of the trust.⁸

4. Where words of condition are annexed to a devise, they will not generally be construed in the strict sense of conditions, so that a failure to perform them will work a forfeiture of the estate, and a right of entry to the settlor or his heirs, unless where there is an express provision to that effect; but such words will be construed as creating a trust enforceable in a court of equity, as where a house is devised, the devisee "keeping the same in repair;" or where an estate is given to one, "he paying the testator's debts in twelve months from the testator's death."⁹

5. And where one covenants upon valuable consideration to charge or settle his estate in any prescribed manner, it will be regarded as creating a trust in favor of those to be benefited by the charge or settlement. And although one under such covenant is not precluded from conveying his estate during his life, in any mode he may *bonâ fide* elect, yet he cannot leave his estate, at his decease, in any mode different from his covenant. And a conveyance during life will be liable to the suspicion of being made in evasion of the covenant, unless there is clear proof to the contrary.¹⁰ So, after the owner of lands has made a definite contract of sale, it is the same as if he had made the conveyance; and he

⁵ *Gilbert v. Bennett*, 10 Sim. 371.

⁶ *Woods v. Woods*, 1 My. & Cr. 409; *Raikes v. Ward*, 1 Hare, 449.

⁷ *Castle v. Castle*, 1 DeG. & Jones, 352.

⁸ *Lewin*, 112.

⁹ *Wright v. Wilkin*, 2 B. & Sm. 232; *Gregg v. Coates*, 23 Beav. 33.

¹⁰ *Lewin*, 113; *Mornington v. Keane*, 2 DeG. & Jones, 292.

will be regarded as holding the same thereafter as trustee for the purchaser, and the rents will belong to him, and it will remain at his risk; and if it should be destroyed by fire, or a mob, the loss must fall upon him, and he must pay the agreed price notwithstanding.¹¹

This portion of the subject might be discussed more in detail, but what has been already said, in different parts of the work, will render it sufficiently intelligible.

¹¹ Lewin, 113, 114; *Acland v. Gaisford*, 2 Mad. 33.

CHAPTER XXIX.

RESULTING TRUSTS.

SECTION I.

WHERE THERE IS A DISPOSITION OF THE LEGAL AND NOT OF THE EQUITABLE ESTATE.

1. Definition of the different kinds of resulting trusts.
2. The natural presumption is in favor of the grantee holding beneficially. Trusts for part. Charge on estate.
3. Circumstances indicating a trust or not.
4. The use of the word "trust" or "trustee" not decisive. Parol evidence.
5. How far the surplus of the avails of real estate will result to the heir.
6. Distinction between a charge upon, and an exemption from.
7. Effect of this distinction on charitable trusts.
8. The operation of the residuary clause.
9. Resulting trusts as to personalty.
10. Resulting trust in real estate defined.

§ 74. 1. TRUSTS by operation of law have been divided into Resulting and Constructive Trusts. The former is where one conveys the legal estate without intending to part with the equitable or beneficial interest, which is therefore said to result to the grantor. The latter is where the purchaser of property takes the conveyance of the legal estate to a third person, without the intention of giving him the beneficial interest.¹ The general rule of law is, that where one conveys the legal title of real estate, without intending to convey the equitable interest, there will be a resulting trust to the grantor or his heirs, and in the case of personalty so conveyed, the trust will result to the grantor, or his next of kin or personal representative. But there must be clear proof that such was the intent of the grantor, for the natural presumption will be, that whoever conveys the title to property, whether legal or equitable, real or personal, intends to part with his whole

¹ Lewin, 115.

interest, and that the grantee shall take the same. It is said the intention to exclude the grantee from the beneficial interest in the estate conveyed may be presumed by the court, or expressed in the instrument. It seems to have been considered from an early day, that, where one conveys an estate to a stranger upon a nominal consideration, or none at all, there will always be a resulting trust for the grantor and his heirs.² But where the conveyance is to a wife or child, or near relative, towards whom the grantor stands in loco parentis, the intention to pass the entire use and beneficial interest will be presumed.² But Lord *Hardwicke* held that, since the statute of frauds, resulting trusts could only exist, "first, where an estate is purchased in the name of one person, but the money or consideration is given by another; or, secondly, where a trust is declared only as to part, and nothing is said as to the rest, what remains undisposed of results to the heir at law, and they cannot be said to be trustees for the residue." His lordship said the courts had declared resulting trusts in no other cases except where fraud or bad faith had intervened.³ And where there has been fraud either in obtaining the deed, or in disguising its real objects and purposes, the courts will receive oral proof of the facts, and upon satisfactory evidence of mala fides will order a reconveyance, or declare the grantee trustee for those beneficially entitled under the deed.⁴

2. We have already said, that, *primâ facie*, a conveyance of property, real or personal, must be presumed to have been with intent to have the grantee hold the estate for his own benefit.⁵ But the nature of the conveyances, or the attending circumstances, will often enable the court to declare a resulting trust to the grantor or his heirs; and it is always considered that, where there is a trust declared of part of the estate, the remainder, if any, will result for the benefit of the grantor or his heirs. But it seems to be equally well settled, that, if an estate be conveyed subject to a certain charge, less than the whole value, the grantee will take the remainder beneficially.⁶ The distinction be-

² *Hayes v. Kingdome*, 1 Vern. 33; *Christ's Hospital v. Budgin*, 2 Vern. 683; *Jennings v. Selleck*, 1 Vern. 467. ³ *Lloyd v. Spillet*, 2 Atk. 148, 150.

⁴ *Hutchins v. Lee*, 1 Atk. 447; *Lewin*, 116; *Birch v. Blagrove*, Amb. 264. *Childers v. Childers*, 1 DeG. & J. 482; *Young v. Peachy*, 2 Atk. 254.

⁵ *George v. Howard*, 7 Price, 651-653.

⁶ *King v. Denison*, 1 Ves. & B. 272.

tween the two classes of cases seems very slight, and the natural presumption, as matter of fact in both classes seems rather to favor the conclusion, that the grantee was intended to take beneficially what was not effectually disposed of. But the decisions are as we have before stated.

3. Where the relationship of the parties is recognized as forming the motive or inducement to any extent of the conveyance, the courts will naturally incline to treat the grantee as holding beneficially.⁷ But this presumption is easily countervailed by other portions of the instrument.⁸ And the heir is not to be excluded from the beneficial use of the estate upon mere conjecture.⁹ But as the resulting trust for the benefit of the heir is based upon a presumption of law, this presumption may be rebutted by parol evidence of an intent to have the devisee or grantee take the beneficial interest.¹⁰ And where the instrument itself states that it is made in trust, but no trust is declared, it is very clear that the grantee or devisee cannot hold beneficially.¹¹

4. But even the use of the words "trust" and "trustee" is by no means conclusive of the intention not to convey the beneficial interest. For although the devise may be expressed to be made in trust, it may appear that no technical trust was intended,¹² but only that some recommendation or desire of the testator or grantor was to be inserted in the instrument without intending to control the conduct of the devisee. And, on the other hand, it has been often held that, even in the absence of all words of trust, the general scope of the devise or conveyance may show very clearly that the devisee or grantee was not intended to take beneficially.¹³ And in all cases where there is a trust resulting to the settlor or his representative, from the terms or construction of the instrument of settlement, and not by mere operation of law, the trustee

⁷ Lewin, 118; *Cook v. Hutchinson*, 1 Keen, 42; *Rogers v. Rogers*, 3 P. Wms. 193.

⁸ *Buggins v. Yates*, 9 Mod. 122.

⁹ *Halliday v. Hudson*, 3 Ves. 211. In order to disinherit the heir the intention to do so must be apparent that it is impossible to doubt it. *Rupp v. Eberly*, 32 Leg. Int. 404.

¹⁰ *Cook v. Hutchinson*, 1 Keen, 50, per *Ld. Langdale*, M. R.

¹¹ *Dawson v. Clarke*, 18 Ves. 254.

¹² *Dawson v. Clarke*, 15 Ves. 409; s. c. 18 id. 247.

¹³ *Saltmarsh v. Barrett*, 29 Beav. 474; s. c. 3 DeG., F. & J. 279.

will not be permitted to control the effect of the written instrument by parol evidence rebutting the inference of trust.¹⁴

5. In trusts for the sale of real estate, the surplus not expended will result to the heir, and not to the executors or next of kin, according to the nature of the property from which the money arose.¹⁵ So, if the estate be descendible only to particular ones, the surplus of the money will go accordingly.¹⁶ And where real and personal estate are blended in one common fund, the surplus, in like manner, will result to the heir or next of kin, as it can be traced either to the real or personal estate for its origin.¹⁷ And even where there is an express declaration, that the proceeds of the real estate shall be considered part of the testator's personal estate, it will be regarded as having reference only to the particular purposes then in hand, and purposed to be accomplished by that particular arrangement. And any surplus remaining of the avails of the real estate will result to the heir,¹⁸ but where the direction is that the avails of the sale of real estate shall be regarded and treated as personal estate, and there is no ground to presume that the direction was intended to be limited to the particular purpose in hand, it will be treated as a conversion for all purposes, or as it is called, a conversion "out and out."¹⁹ But this question is of little importance in this country, since the same persons will generally take both real and personal estate, being both heirs and next of kin.

6. But it will be proper to bear in mind the distinction between trusts, where a surplus of the funds remains in the hands of the trustee, and cases where estate is conveyed subject to a charge, less than the value of the estate. In the latter class of cases the devisee or grantee takes the estate subject to the charge, and whatever surplus remains after satisfying the charges he will take beneficially. And even when the charge fails for any reason, the

¹⁴ *Langham v. Sanford*, 17 Ves. 435, 443 ; s. c. 19 id. 641, 643.

¹⁵ *Starkey v. Brooks*, 1 P. Wms. 390; *Wilson v. Major*, 11 Ves. 205; *Lewin*, 121, and cases in note (a).

¹⁶ *Hutcheson v. Hammond*, 3 Br. C. C. 128.

¹⁷ *Ackroyd v. Smithson*, 1 Br. C. C. 503. And in such cases where there is no direction how the trustees are to dispose of the real estate it will result to the heir. *Longley v. Longley*, L. R. 13 Eq. 133.

¹⁸ *Collins v. Wakeman*, 2 Ves. Jr. 683.

¹⁹ *Lewin*, 122, and cases cited.

devisee will hold the entire estate freed from the charge.²⁰ And the same rule obtains where the estate is devised subject to the charge of a sum to be appointed, and the appointment is never made.²¹ The cases dwell much upon the distinction between a devise, "subject to" a charge or burden, and where the devise contains an exception out of the estate devised. In the latter case the exception forming no part of the devise, when it fails it cannot go to increase the estate of the devisee, but results to the heir or next of kin as the case may be.²²

7. It has been made a question how far this distinction between a charge upon and an exception from a devise should be applied to charitable legacies. But there seems no doubt it must be observed, as much in this class of legacies as any other. And in all cases, as said by Lord *Alvanley*, M. R.,²³ "It is now perfectly settled, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall take the benefit of it and take the estate." The cases are considerably numerous, and somewhat conflicting upon the point of the application of the particular distinction between a charge and an exception, as affecting charitable bequests, and we cannot do better than refer the student to Mr. Lewin's very perspicuous analysis and statement of the results.²⁴

8. But in regard to all these resulting trusts, in the case of wills, it must be considered that more commonly the residuary clause will cut them off, or at all events was intended to have that effect. But through defect of language it often happens that the intended result cannot be reached. There was in the English courts, before the late Wills Act,²⁵ a broad distinction maintained between the operation of a residuary clause in the will, in regard to real and personal estate; in the former case it only operating upon such estate as was not attempted to be disposed of by the will, and in the latter case having full operation to dispose of all the personalty not otherwise effectually disposed of. The result of this distinction was that the residuary clause had no operation

²⁰ *Cooke v. The Stationers' Company*, 3 My. & K. 264; *Sprigg v. Sprigg*, 2 Vern. 394; *Sutcliffe v. Cole*, 3 Drew. 135.

²¹ *Jackson v. Hurlock*, 2 Eden, 263.

²² *Lewin*, 124, 125, and cases cited; *Sidney v. Shelley*, 19 Ves. 352.

²³ *Kennell v. Abbott*, 4 Ves. 811.

²⁴ *Lewin*, 125-127.

²⁵ 7 Will. 4 and 1 Vic. c. 26, § 25.

upon any real estate, attempted to be devised, but where the devise for any cause failed of going into full operation, as by lapse or illegality or otherwise; but in the case of the personalty the residuary clause carried all which had not been effectually disposed of, so that nothing could result to the next of kin out of the personalty, where the will contained a residuary clause, except by the failure of part or all of that clause, or where something is excepted from it. But by the present English Wills Act, and always in America, the residuary clause in the will had the same operation both upon real and personal estate, and we have no occasion to discuss the distinction further.

9. Where part of the personal estate is exempted from the residuary clause, with a view to the making of a codicil, and none is made, or for any other reason, or where there is no residuary clause, or it fails, either in whole or in part; a resulting trust in favor of the next of kin will occur, and where there is no next of kin, the trust will result in favor of the State, or sovereignty, as *bona vacantia*. But gifts for charitable purposes commonly form an exception to the rule of resulting, upon failure, to the heir or next of kin, or falling into the residue, since generally the courts, upon the failure of the particular charitable object, will apply the fund to some other purpose which they regard as coming nearest to that designated, upon what has been called the doctrine of *cy pres*, which has been already explained.²⁶

10. Where the plaintiff conveyed an estate to the defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the defendant; but no purchase-money actually passed, and the plaintiff alleged that he conveyed the estate to the defendant as trustee for him. The defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the plaintiff made the conveyance fearing that an adverse decision would be made against him in a suit then pending in chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made that he should reconvey the estate. The defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the Statute of Frauds; it

²⁶ Ante, Vol. 2, § 36, pl. 65, and notes.

was held there was no sufficient averment that the transaction was illegal, and also that the Statute of Frauds could not be pleaded in answer to the plaintiff's claim ; and that as the evidence did not establish the existence of any such agreement as was alleged by the defendant, the defendant must reconvey the estate to the plaintiff.²⁷

²⁷ *Haigh v. Kaye*, 7 Ch. App. 469.

CHAPTER XXX.

CONSTRUCTIVE TRUSTS.

1. This chapter covers an important and extensive portion of the subject.
2. When the trustee renews a lease of the trust estate in his own name he is constructively trustee still.
3. The rule extends to every species of trustee or agent.
4. The price of trust property affected with the same trust as the property.
5. Presumptions from lapse of time. Statute of limitations.
6. The rule as to trustees extends to all in fiduciary relations.
7. The agent of the trustee not liable, as trustee, except for fraud.
8. Extent of statute of frauds.

§ 75. 1. THE subject of constructive trusts is one that has a very wide operation. It is one of the practical inventions of the courts of equity, whereby the wickedness and unfaithfulness of mere fiduciary relations are made to subserve the ends of justice and fair-dealing, by impressing upon the trust fund a sacred character, which no colorable sale, transfer, or devise shall be able to blot out until the same is brought under the power of a *bonâ fide* transfer by one having competent authority, and to one acting upon proper inquiry, and in the utmost good faith.¹

2. The most common of the early illustrations of the principle of constructive trusts will be found in the case of a tenant, or other person standing in a fiduciary relation, renewing the lease in his own name, and upon the payment of the fines or bonus due upon such renewal. In all such cases the courts of equity will compel the person thus renewing the lease in his own name to acknowledge the trust, and convey the leasehold interest for the benefit of those entitled.² And one who purchases under such constructive

¹ It will doubtless be supposed by many who have had but slight experience either in legislation or the judicial administration of the law, that it might be quite as easy, and far more hopeful to find such a remedy for fraud and evasion in legislation than in judicial construction. But, in fact, the judges are so constantly schooled in studying these devices and the desired redress, that they come to comprehend both the evil and the remedy, far better than legislators, trained only in their own school, possibly can.

² *Killick v. Flenney*, 4 Br. C. C. 161; *Pickering v. Vowles*, 1 id. 197, 198; *Nesbitt v. Tredennick*, 1 Ball & B. 46.

trustee will stand in no better condition than the trustee.³ This rule extends to all persons standing in fiduciary relations, such as executors;³ administrators; tenants; guardians; and even to executors de son tort;⁴ as well as to every class of persons coming under the technical denomination of trustees.⁵ And where the trust was for the benefit of an infant, and the lessors declined to renew in the name of the infant, and the trustee took a renewal in his own name, he was held to be trustee for the infant.⁶

3. And where any one, having but a partial interest in a lease; as joint-tenant;⁷ tenant for life, with power of appointment not exercised;⁸ or mortgagee;⁹ devisee, subject to debts and legacies,¹⁰ or to an annuity;¹¹ or a partner,¹² renews the term on his own account and in his own name, he will, in equity, be held as trustee for the parties equitably interested therein, and decreed to convey for their benefit. And the same rule will be applied to a tenant from year to year,¹³ or even by sufferance or at will, no doubt.¹⁴ However slight or precarious the interest, so long as one holds possession of an estate or property in any fiduciary relation, he cannot deal with it for his own advantage, in any manner or to any extent, until he has first surrendered his interest and possession, and obtained formal discharge from such relation. And the same rule will apply to any agent of such trustee or quasi trustee,¹⁵ although such agent came into the business as a mere volunteer.

³ *Walley v. Walley*, 1 Vern. 484.

⁴ *Mulvany v. Dillon*, 1 Ball & B. 409.

⁵ *Griffin v. Griffin*, 1 Sch. & Lef. 354, by Lord *Redesdale*; *Pierson v. Shore*, 1 Atk. 480, by Lord *Hardwicke*; *Turner v. Hill*, 11 Sim. 13, by Sir *L. Shadwell*.

⁶ *Sandford v. Keech*, Sel. Cas. Ch. 61.

⁷ *Palmer v. Young*, 1 Vern. 276.

⁸ *Eyre v. Dolphin*, 2 Ball & B. 290, and cases cited; *Lewin*, 148, n. (a).

⁹ *Nesbitt v. Tredennick*, 1 Ball & B. 46, by Lord *Manners*.

¹⁰ *Jackson v. Welsh*, Ll. & Go. t. Plunket, 346.

¹¹ *Winslow v. Tighe*, 2 Ball & B. 195.

¹² *Featherstonhaugh v. Fenwick*, 17 Vesey, 298.

¹³ *James v. Dean*, 11 Vesey, 383; s. c. 15 Vesey, 236.

¹⁴ Lord *Eldon*, in *James v. Dean*, 11 Vesey, 392. But if the executor of a tenant by sufferance or at will renew the lease for a greater interest, he will not be held as trustee for the devisee, since the interest being determined by the death of the testator, there was no interest passed to the devisee under the will; but in such case the executor will be declared trustee for the whole estate. *Ib.*

¹⁵ *Griffin v. Griffin*, 1 Sch. & Lef. 353.

4. So, too, if the trustee or agent, or any one standing in any fiduciary relation, after having obtained title in his own name, or having a power of sale as such trustee or agent, should dispose of the trust property, the price or consideration of such transfer will be treated, in a court of equity, as affected with the same trust as the property itself. And the same principle applies, where the tenant or executor of a deceased tenant sells the right of renewal; the trust will attach to the money or other property received in exchange.¹⁶ But whenever one obtain-

¹⁶ *Owen v. Williams*, Amb. 734. The produce of a specific legacy being traced into post-obit securities, given by the party to whom the avails of the legacy had just gone, after it left the hands of the administrator, the court held that the cestui que trust was entitled to a charge on the securities. *Harford v. Lloyd*, 20 Beav. 310. See also *Ernest v. Croysdill*, 6 Jur. N. S. 740. The facts of the case were that a specific legacy of £6,000 consols, bequeathed to the plaintiffs, was unnecessarily and improperly sold out by the administrator, with the concurrence of another party, and the proceeds carried partly to the banking account of the administrator, and partly to that of the other party. A series of shuffling of checks and transfer of moneys took place; but £2,908 was traced to the other party. About this time this party laid out moneys in the purchase of post-obit securities; and though the trust-moneys could not be distinctly traced into the securities, yet the court held, from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the onus of disproving it; and this not being done, the court enforced the lien for that sum. It appeared that the securities had been sold and transferred to a third party, in consideration of a debt then owing. But it appearing also that he had notice that the moneys by which the securities had been obtained came from the trustee, though he had no notice of the breach of trust, it was considered that he could not set up an adverse title against the trustee, and much less against the cestui que trust. This subject of making one trustee for money misapplied is very extensively discussed, and made to operate very equitably, under a peculiar state of facts, where the agent of a manufacturing corporation, without the knowledge of the directors, had contracted with a capitalist for the advance of large sums of money, from time to time, the contract being beyond the scope of his authority. This money had been put into the business of the company, in the purchase of wool and other materials for manufacture, and had thus become incapable of clear identification. It was held that, if the corporation, after becoming aware of the facts, claimed to retain the funds, they thereby ratified the act of their agent in toto and were bound to account for the money in the manner stipulated by the agent, and thus give the plaintiffs a lien for their advances upon the cloths manufactured. But if the corporation, upon discovering the terms of the contract of their agent, repudiated it, and the avails of the money, so far as practicable, then the act of the agent in putting the money into the business of the company, was a misapplication of the money, and the plaintiffs

ing property in violation of his duty as trustee is decreed to convey it for the benefit of the cestuis que trustent, he will be indemnified for all expense and other duties.¹⁷

5. It is scarcely necessary to mention, that the claim of the cestui que trust, although not subject to any statute of limitations, or presumptive bar from lapse of time,¹⁸ must be promptly presented and prosecuted, or the courts of equity will not readily listen to it, unless there is some adequate excuse for the delay.¹⁹ The whole subject of the operation of the statute of limitations upon claims of an equitable character is important, but not entirely

may reclaim them, into whatever hands they came, or in whatever form they existed, until after a bonâ fide sale without notice. *Whitwell v. Warner*, 20 Vt. 425. Where a purchaser is compelled by a court of equity to relinquish his purchase in favor of the cestui que trust, on the ground that the vendor committed a breach of trust in the sale, the purchaser is entitled to all the assistance which the court or the cestui que trust can give him to recover from the fraudulent trustee the purchase-money still in his hands. *Hope v. Liddell*, *Liddell v. Norton*, 21 Beav. 183. There is no rule of equity law applicable to trusts which is more uniformly acted upon by the courts than that one who assumes to act in relation to trust property, without just authority, however bonâ fide may be his conduct, shall be held responsible both for the capital and the income, to the same extent as if he had been de jure trustee. *Hennessey v. Bray*, 33 Beav. 96.

Thus, where the estate of tenant for life was liable to forfeiture, upon his mortgaging the same, and he executed a mortgage to one without the knowledge of those taking under the forfeiture, it was held that such mortgagee was responsible to those entitled under the forfeiture, from the filing of the bill, at all events, and, beyond that, from the time he had notice of the trust creating the forfeiture. *Ibid.* This principle is very broadly asserted in a very recent case (*Rolfe v. Gregory*, 11 Jur. n. s. 98), in the Court of Chancery, where the trustee had wrongfully put the trust money to the payment of his own debt, with the knowledge of the trust on the part of his creditor. The latter was decreed to refund the money to the cestui que trust after the lapse of twenty years. And the principle of following trust funds in the hands of a defaulting trustee applies against the assignees of such trustee as fully as against the trustee himself; and the evidence that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other money, was held not to raise any equity in favor of the assignees or general creditors, as against the owners of the trust fund. *Frith v. Cartland*, 2 H. & M. 417; 11 Jur. n. s. 238.

¹⁷ *Bowles v. Stewart*, 1 Sch. & Lef. 209.

¹⁸ 2 Story, Eq. Jur. §§ 1520-1520 b; *Watson v. Saul*, 5 Jur. n. s. 404. The statute of limitations has no application to express trusts where there is no disclaimer. *Seymour v. Freer*, 8 Wallace, 202.

¹⁹ *Clegg v. Edmondson*, 8 DeG., M. & G. 787.

within the scope of this work. The general rule of law, however, upon that subject may be here stated. If the trust is an express and acknowledged one, the statute of limitations, or the presumptive bar from lapse of time, will not apply, since the trustee, standing in a fiduciary relation, is bound to look to the interests of the cestuis que trustent, and their acquiescence in his management of the estate affords no ground of presumption against their legal rights. But in regard to trusts resulting from the operation of law, the rule is different, since the claim of the trustee is there adverse to the trust, and so long as it is acquiesced in, it tends constantly to raise a presumption in its favor.

6. And, as we have before intimated, this rule of duty on the part of trustees to serve the interest of the beneficiaries, and that they can secure no interest for themselves, extends to every relation, where one person either expressly, or by intendment of law, undertakes, or is bound in equity and good faith to serve the interests of others, either exclusively or in connection with their own interests. It has thus been held to include factors,²⁰ agents,²¹ partners,²² inspectors²³ under creditor's deed, and every other class of fiduciary agent. And where money was paid to the tenant for life, in consideration of his not opposing a railway bill in parliament, he was declared to hold the money in trust for all persons interested in the estate.²⁴ And a mortgagee in possession is trustee of the rents and profits of the estate, and bound to apply them towards the mortgage, or to account for them towards liquidating the charges upon the estate.²⁵ And an attorney, who by breach of his duty gains an unequal advantage, will be declared trustee for the party damnified to the extent of such advantage.²⁶ Lord *Eldon* here said: "You who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by the neglect, you shall not hold that advantage, but you shall be a trustee of the property for that person who would

²⁰ *East India Co. v. Henchman*, 1 Ves. Jr. 287.

²¹ *Fawcett v. Whitehouse*, 1 R. & My. 132; *Gillett v. Peppercorne*, 3 Beav.

78.

²² *Bentley v. Craven*, 18 Beav. 75.

²³ *Coppord v. Allen*, 2 DeG., J. & Sm. 179.

²⁴ *Pole v. Pole*, 2 Drew. & Sm. 420.

²⁵ *Hughes v. Williams*, 12 Vesey, 493.

²⁶ *Bulkley v. Wilford*, 2 Cl. & Fin. 177; s. c. 8 Bl. N. s. 111.

have been entitled to it, if you had known what, as an attorney, you ought to have known ; and, not knowing it, you shall not take advantage of your own ignorance."

7. The agent of the trustee is, in general, only liable to the trustee to render an account of his transactions.²⁷ But there are many cases where such agent takes an actively fraudulent course, that he will make himself responsible directly as principal and trustee by tort.²⁸

8. It has generally been considered, that, by a fair construction of the statute of frauds, all trusts are excepted from it which "arise or result by the implication or construction of law," in the words of the statute ; which will embrace not only all those trusts which were denominated resulting trusts by Lord *Hardwicke*,²⁹ such as where an estate is purchased in the name of one person, but the money or consideration is given by another, and where a trust is only declared as to part, and nothing said as to the remainder, which will result to the heir ; but also such as arise by the construction of courts of equity, as contended by Mr. Fonblanque.³⁰

²⁷ Lewin, and cases cited, n. (d), 156.

²⁸ *Hardy v. Caley*, 33 Beav. 365 ; *Fyler v. Fyler*, 3 Beav. 550.

²⁹ *Lloyd v. Spillet*, 2 Atk. 150.

³⁰ 2 Eq. 116, n. (a), Lewin, 157-160.

CHAPTER XXXI.

DISCLAIMER AND ACCEPTANCE OF TRUSTS.

1. Trustee not bound to accept, but his heir is. Trustee may disclaim, and still have legacy under same will.
2. The mode of disclaimer. Costs recoverable.
3. Not now required to be by matter of record. May be by parol.
4. Where there are joint trustees, disclaimer of one makes the other sole trustee.
5. The mode of accepting the trust.
6. At what particular point the responsibility as trustee attaches, and the extent of the same.
7. One may become trustee by tort or by mistake.

§ 76. 1. THERE is, of course, in the first instance, no duty upon any one, to accept a trust. "No one is bound by law to prove a will," as said by Sir *L. Shadwell*, V. C.;¹ and the same is true of all trusts.² But it is said, the heir of one who has accepted a trust cannot disclaim.³ And if one be nominated as trustee in a will, under which he receives a legacy, he may renounce the trust, and at the same time have the legacy.⁴ And an executor, who has also a legacy, may disclaim being executor, and still have his legacy, unless where it is given him as executor.⁵

2. But if one is named as trustee, without having given any encouragement to accept the trust, he will be justified in taking the opinion of counsel in regard to executing a deed of disclaimer.⁶ And it seems to be conceded that, where one is named trustee, and determines to renounce the trust, it should be done by deed, in order to furnish unequivocal evidence in regard to the point.⁷ But a trust may be disclaimed in court, or by answer in chancery, and the party thus disclaiming will be allowed all necessary costs up to the earliest time of having opportunity to disclaim.⁸ But

¹ *Lowry v. Fulton*, 9 Sim. 115, 123.

² *Moyle v. Moyle*, 2 R. & M. 715, by Lord *Brougham*.

³ *Lewin*, 161, 162.

⁴ See *Pollexfen v. Moore*, 3 Atk. 272.

⁵ *Slaney v. Watney*, Law Rep. 2 Eq. 418.

⁶ *In re Tryon*, 7 Beav. 496.

⁷ *Stacey v. Elph*, 1 M. & K. 199, by Sir *John Leach*, M. R.

⁸ *Lewin*, 163 and notes.

it seems ordinarily only as between party and party.⁹ And unquestionably one may disclaim a trust as effectually by words or acts without deed, as by deed.¹⁰ But it seems obvious, that a prudent man would naturally prefer having so important a point placed beyond question by some unequivocal act.¹¹ But it is said, there is no valid objection to one, named as trustee, after the fact of disclaimer is effectually declared and accepted, acting as agent in the management of the trust.¹²

3. It seems that upon a conveyance to one as trustee, even with onerous trusts, and without consent, the title vests in him, subject to the right of disclaimer.¹³ And the early doctrine was, that a disclaimer, in order to divest the title, should be by matter of record.¹⁴ But the rule is now well settled, that disclaimer of record is not at all indispensable. For if that were to be so held, the party might never have an opportunity to disclaim.¹⁵ In the case last cited, *Abbott*, Ch. J., said: "The law certainly is not so absurd as to force a man to take an estate against his will. . . . The learned counsel has not been able to suggest any mode by which the devisee could have disclaimed in a court of record; and certainly it could not be done unless some other person had thought fit to cite him there to receive his disclaimer; and if the estate were *damnosa hereditas*, that would not be likely to happen. It might, therefore, in some instances, be a matter of difficulty to make a disclaimer in a court of record." There seems no question it may be done by parol even.¹⁶

4. The effect of a disclaimer, where there is a co-trustee, seems to be to vest the whole legal estate in the other trustee;¹⁷ and he may execute the office, even when connected with a power, without the concurrence of the co-trustee.¹⁸ The settlor, it is

⁹ *Norway v. Norway*, 2 My. & K. 278. But see *Legg v. Mackrell*, 1 Giff. 166.

¹⁰ *Stacey v. Elph*, *supra*.

¹¹ *Lewin*, 163.

¹² *Dove v. Everard*, 1 R. & M. 231.

¹³ *Siggers v. Evans*, 5 Ell. & Bl. 380.

¹⁴ *Butler & Baker's case*, 3 Co. R. 26 a, 27 a; *Lewin*, 164.

¹⁵ *Townson v. Tickell*, 3 B. & Ald. 31; *Lewin*, 164 and notes.

¹⁶ *Foster v. Dawber*, 8 W. R. 646; *Re Ellison's Trusts*, 2 Jur. n. s. 62. Lapse of twenty years without acceptance amounts to a renunciation. *Re Robinson*, 37 N. Y. 261.

¹⁷ *Crewe v. Dicken*, 4 Vesey, 100.

¹⁸ *Adams v. Taunton*, 5 Mad. 435; *Cooke v. Crawford*, 13 Sim. 96.

said, must be presumed to have named the joint trustees with full knowledge of the law upon the subject, and the right of one joint trustee to disclaim, and the effect of such disclaimer.¹⁹ And this disclaimer operates retroactively, and makes the trustee sole trustee from the beginning.²⁰

5. The acceptance of the trust will be signified according to the form of creating and the nature of the trust. Where there is a formal deed, it is expected to be done by signing the deed creating the trust,²¹ or by an express declaration by the trustee of his acceptance, or by proceeding to act in the duties of the trust.²² And it was said by one having great knowledge and experience upon the subject,²³ "that where an estate was vested in trustees, who knew of their appointment, and did not object at the time, they would not be allowed afterwards to say that they did not assent to the conveyance; and it would require some strong act to induce the court to hold that in such a case the estate was divested. He spoke with respect to the effect upon third parties; every court and every jury would presume an assent." The trustee, although in general, like other parties, considered as bound by the recitals in the deed of trust, where he executes the same, will not be held conclusively so bound.²⁴ An executor signifies his acceptance by proving the will, and taking letters testamentary, and the executor of an executor in England cannot accept the trust as to the first testator, without also accepting that of his testator.²⁵ So, too, if the executor intermeddle with the estate, it is regarded as conclusive evidence of acceptance of the trust. But any equivocal act which is fairly referable to other purposes will not have the same decisive effect. And it has been said, if the trustee act ambiguously, he cannot afterwards take advantage of such ambiguity, and say he did not intend to accept the trust.²⁶ And where there is a special trust devolved upon the executor, the

¹⁹ *Browell v. Reed*, 1 Hare, 434, by *Wigram*, V. C.

²⁰ *Peppercorn v. Wayman*, 5 DeG. & Sm. 230.

²¹ See *Buckeridge v. Glasse*, Cr. & Ph. 126, 134, where the Lord Chancellor, *Cottenham*, speaks of the trustee "not having executed the deed."

²² *Lewin*, 165; *Doe v. Harris*, 16 M. & W. 517.

²³ Lord *St. Leonards*, in *Wise v. Wise*, 2 Jones & La T. 403.

²⁴ *Fenwick v. Greenwell*, 10 Beav. 418.

²⁵ *Lewin*, and cases cited, 167.

²⁶ *Conyngham v. Conyngham*, 1 Ves. Sen. 522.

acceptance of the office of executor will be regarded as an acceptance of the accompanying trust.²⁷ And where the same person is named trustee of two distinct trusts in one deed, the acceptance of one will be construed as an acceptance of both.²⁸ But, as we have seen, where the will confers special trusts upon the executor, and he renounces the trust, and an administrator with the will annexed is appointed, the latter will not assume the special trusts of the will, but only those of administering the goods and effects of the estate.²⁹

6. It is sometimes a nice question where the office of executor ends, and that of special trustee under the will begins. But it is said, that as soon as the legacy is severed from the estate, the duty of trustee begins,³⁰ and that the same holds true even as to legacies to the executor in trust, and that as soon as he assents to the legacy he becomes trustee for the same under the will.³¹ And all trustees, whether associated with others or not, must understand that, by the acceptance of the trust, they incur the active obligation of understanding and seeing to the performance of the duties of the trust, and that they cannot trust these matters to their associates, without being held responsible for their delinquencies.³²

7. It may not be altogether unimportant to mention that one may incur the responsibility of trustee by intermeddling with trust property, either by mistake, or as a tortfeasor.³³

²⁷ *Mucklow v. Fuller*, Jac. 198; *Ward v. Butler*, 2 Molloy, 533.

²⁸ *Urch v. Walker*, 3 My. & Cr. 702.

²⁹ Ante § 9, and cases cited in notes. Lewin, 168, 169.

³⁰ *Phillipo v. Munnings*, 2 M. & C. 309.

³¹ *Dix v. Burford*, 19 Beav. 409.

³² Lewin, 170, 171.

³³ *Rackham v. Siddall*, 16 Sim. 297; s. c. 1 Macn. & Gord. 607; *Pearce v. Pearce*, 22 Beav. 248.

CHAPTER XXXII.

ESTATE TAKEN BY THE TRUSTEE.

SECTION I.

UNDER THE STATUTE OF USES.

1. What uses will be executed under the statute, and what ones will not.
2. Special and active trusts ; use not executed under statute.
3. The distinction seems to turn upon the point whether the trustee has any personal and active duty in the matter.
4. The American rule the same.

§ 77. 1. UNDER the statute of uses,¹ a mere use or naked trust will be executed, and the legal title pass by force of the statute to the beneficial owner of the estate. And it will make no difference that the holder of the legal title is designated in the conveyance as trustee. If he have no special duty imposed upon him, except to hold the legal title for another, the title and possession will pass by force of the statute to that other, the same as if it had been conveyed directly to him in the first instance.² Lord *Holt*, Ch. J., here thus states the point: "This would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the statute, which mentions the word trust as well as use." And it has been held, that, even where the trustee holds the estate to the sole and separate use of a married woman, that this is no such special duty in the trustee as will prevent the operation of the statute, but that the title and possession will pass to the cestui que use, under it.³ But where there is a special duty and charge in regard to the estate, or the income of it, imposed upon the trustee, he will retain the legal estate in order to enable him the better to execute the duty, and the statute will

¹ 27 Henry 8.

² *Broughton v. Langley*, 2 Salk. 679.

³ *Williams v. Waters*, 14 M. & W. 166.

have no operation upon it.⁴ In order to prevent the legal title passing under the statute, it must appear that the pecuniary use of the estate was intended to come to the trustee, either for himself, or to enable him to perform some duty or trust imposed on him.⁵ Hence an estate limited to A. to the use of A., in trust for B., will give the legal estate to A., and the statute will have no operation upon it.⁶ So that a use upon a use will not be executed by the statute.

2. The illustrations of the particular trusts and duties in the trustee, which will prevent the operation of the statute upon the uses, will be found in the cases which have been decided upon the point; as where the trustee is to pay the rents;⁷ or where the trustee is to convey;⁸ or where the rents are to be applied for "subsistence and maintenance" of the cestui que trust;⁹ or in making repairs;¹⁰ or where there is a power connected with the trust to sell the whole or a sufficient part for the payment of debts and legacies.¹¹ And it was once held, that where the use of an estate is secured to a married woman, to her sole and separate use, and exempt from the payment of any debts of her husband, and her receipt alone to be sufficient discharge, that it created a special trust in the trustee, which the statute will not operate upon.¹² But in *Williams v. Waters*,¹³ as before stated, it was considered that the mere securing the use to the separate use of a married woman was not sufficient to prevent the operation of the statute. The opinion of the judges in this case puts the point, undoubtedly, upon the true ground. *Parke, B.*, said, "We cannot collect clearly from the words of the deed, that they intended to give the trustees an *active trust* to exclude the husband from control, *by giving the estate to the trustees, in order to pay over the rents and profits to the wife.*" *Alderson, B.*, said, "In cases of what are called *active*

⁴ *Robinson v. Grey et als.* 9 East, 1.

⁵ *Hopkins v. Hopkins*, 1 Atk. 589; *Doe v. Passingham*, 6 B. & C. 305.

⁶ *Doe v. Passingham*, *supra*.

⁷ *Robinson v. Grey*, 9 East, 1. But see *Kenrick v. Beauclerk*, 3 B. & P. 175; *Creaton v. Creaton*, 3 Sm. & Gif. 386; *Collier v. M'Bean*, 34 Beav. 426.

⁸ *Garth v. Baldwin*, 2 Ves. Sen. 646. See *Doe v. Nicholls*, 1 B. & Cr. 336.

⁹ *Silvester v. Wilson*, 2 T. R. 444. See *Doe v. Biggs*, 2 Taunt. 109.

¹⁰ *Shapland v. Smith*, 1 Br. C. C. 75.

¹¹ *Bagshaw v. Spencer*, 1 Ves. Sen. 142, 144.

¹² *Harton v. Harton*, 7 T. R. 652.

¹³ 14 M. & W. 166.

trusts, it is a use given to the trustees themselves, on which a use cannot be executed by the statute."

3. The distinctions are sometimes very nice, but they all seem to turn upon the point, whether the trustee has any active duty to perform either in regard to the estate or the income. Thus it was held that a mere trust "to permit and suffer A. to receive the rents," will not create any such active duty on the part of the trustee as will prevent the statute passing the use to the *cestui que trust*.¹⁴ But where the trustee has no duty whatever to perform, and there is no necessity of the title remaining longer in him; in short, where a court of equity would decree a conveyance to the beneficial owner, it is a mere dry trust or naked use and will pass under the statute.¹⁵

4. The American cases adopt the same rule already deduced from the English cases in regard to the estate taken by the trustee. Thus it is declared in a modern case in Pennsylvania,¹⁶ that in regard to an estate given to trustees, in whatever form the deed may be expressed, they will take such an estate as will enable them to execute the trust. A limitation of real estate to the trustees, their executors, administrators, and assigns, will convey a fee where that is required; and a devise to trustees, their heirs, executors, &c., will give an estate less than a fee, where that will suffice. The same rule of construction was adopted in New Hampshire,¹⁷ in regard to a grant of land to B. in trust for a corporation, for the purpose of building a bridge and access thereto. The conveyance was held to carry a fee without words of limitation to that extent, for the reason that the nature of the trust is such as to require a fee.

¹⁴ *Broughton v. Langley*, 2 Salk. 679; *Right v. Smith*, 12 East, 455.

¹⁵ *Rife v. Geyer*, 59 Penn. St. 393.

¹⁶ *McBride v. Smyth*, 54 Penn. St. 245. See *Ivory v. Burns*, 56 Penn. St. 300, as to the construction and mode of creating trusts.

¹⁷ *Wilcox v. Wheeler*, 47 N. H. 488.

SECTION II.

THE QUANTITY OF ESTATE TAKEN BY THE TRUSTEE.

1. The courts will imply such an estate in the trustee as will meet the necessities of the trust.
2. How far naming one trustee will vest in him the real estate.
3. How far the courts make implications in wills, in order to restrict the estate of the trustee to the necessities of the trust.
4. But where the trustee has a discretion requiring a fee so construed.
5. Newly appointed trustees take same title as others.

§ 78. 1. As we have before stated, the estate taken by the trustee, will in general be so construed as to meet the necessities of the equitable estate.¹ In many cases where there is no express grant of an estate to the trustee, the courts imply one to meet the necessities of the equitable estate, as where the testator devised to his wife the issues and profits of certain lands to be paid by his executors, and it was held, that although there was no formal devise to the executors, it must be implied that the executors were to take the lands in order to pay over the issues and profits to the wife of the testator.² So also where the devise³ was to the trustees and the survivor of them, and the executor of such survivors to apply the rents to the payment of certain annuities, it was held that, the annuitants having all deceased, the estate in the trustees and executors, &c., will cease, the purposes of the trust being satisfied; and if the necessities of the trust require it, the estate in the trustees would have been extended by construction to meet those necessities.³ And where the devise to the trustees is without the word "heirs," but the trust cannot be met without the trustees taking an estate of inheritance, it will be considered that a fee passes.⁴ And in trusts for sale, or to pay sums out of the estates inconsistent with the expectation of raising them from the income, it will be held that a fee passed to the trustee, since nothing less

¹ Ante, Vol. 2, § 20, Pl. 10 and notes, pp. 325, 326.

² *Bush v. Allen*, 5 Mod. 63. See also *Doe v. Homfray*, 6 Ad. & Ellis, 206; *Oates v. Cooke*, 3 Bur. 1684; s. c. 1 W. Bl. 543; *Doe v. Woodhouse*, 4 T. R. 89. And after the purposes of the trust are accomplished the remainder of the estate will vest in those entitled to it. *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

³ *Doe v. Simpson*, 5 East, 162.

⁴ *Villiers v. Villiers*, 2 Atk. 72. See *Collier v. Walters*, L. R. 17 Eq. 262.

will meet the performance of the trusts.⁵ But a power of selling will not be implied from a devise to the trustee, or to him and his executors and administrators, upon trust to pay debts and legacies generally,⁶ or to raise a sum of money,⁷ and therefore in such cases only a chattel interest will pass to the trustee, unless the devise contain an express limitation to the trustee and his heirs.⁸ And a devise to two, and to the survivor and his heirs, will be held to create a freehold interest for the joint lives of the trustees and a contingent remainder in fee to the survivor, unless where there are special words indicating a different estate, or the trusts are of such a character as to require a different estate in the trustee.⁹

2. The mere naming one executor and trustee will not vest the real estate in him, unless some act is required to be done by him requiring the possession of a freehold interest, when such an estate will be implied.¹⁰ But if one appoint another "trustee of inheritance," it will be held that the title of the heritable property passes to him.¹¹ So also it will have that effect, to appoint A. & B. trustees, as also their heirs and assigns.¹² And if the testator constitute a trustee by will and also devise the real estate to him, and afterwards by codicil change the trusteeship, it will have the effect to transfer the title to such newly appointed trustee by implication.¹³

3. But the estate in the trustee will be so construed as not to be greater than is required for the due execution of the trust. Thus upon a devise to trustees, in trust to permit the testator's wife to occupy the same, and to receive the rents and profits until his son was of age, and on that event, in trust to release and convey the

⁵ *Shaw v. Weigh*, 2 Str. 798; *Bagshaw v. Spencer*, 1 Ves. Sen. 144; *Glover v. Monckton*, 3 Bing. 13; *Gibson v. Montford*, 1 Ves. Sen. 485, 491.

⁶ Co. Litt. 42 a; *Carter v. Barnadiston*, 1 P. Wms. 505.

⁷ *Doe v. Simpson*, 5 East, 162.

⁸ *Wright v. Pearson*, 1 Eden, 119.

⁹ *Lewin*, 176, 177.

¹⁰ *Oates v. Cooke*, 3 Bur. 1684.

¹¹ *Trent v. Hanning*, 4 B. & P. 116, where the contrary opinion was held, but Lord *Eldon*, not being satisfied with the opinion of the Common Pleas, sent the case to the King's Bench, where the doctrine of the text was held by a majority of the court, 7 East, 96, and the Lord Chancellor, having adopted the opinion, 10 Vesey, 495, it was affirmed on appeal to the House of Lords, 1 Dow, 102.

¹² *Bennett v. Bennett*, 2 Drew. & Sm. 266.

¹³ *Re Hough's Will*, 4 DeGex & Sm. 371; *Re Turner*, 2 DeG., F. & Jones, 527.

estate to the son in fee, it was held, that although the trustees must take the legal estate in order to convey to the son when of age, that will not prevent the widow from taking the legal estate in the mean time.¹⁴ And on the contrary, if the devise be to the trustee and his heirs to pay to A. the rents during his life, and after his death to B. in fee, here the estate for life will vest in the trustee, but that in remainder will vest immediately in him entitled in remainder.¹⁵ So a devise to one and his heirs in trust for the separate use of a feme covert during her life will be construed to give the trustee only an estate *pur autre vie*.¹⁶ But in another case,¹⁷ where the devise was to the trustee and his heirs, in trust out of the rents and profits to raise and pay a jointure, the estate of the trustee was held to be a fee. And where a devise was to A. for life, remainder to trustees and their heirs to preserve contingent remainders, not saying during the life of A., with remainders over, the trustees have been held to take not a fee-simple, but an estate for the life of A. But in just such a case arising upon a deed, although at first the courts seemed inclined to adopt the same construction,¹⁸ as in the case of a devise, the rule was finally determined differently, and the construction has been more liberal in favor of creating a fee in the trustees.¹⁹ But even in the case of a deed, it is said, where it appears upon the face of the deed itself, that the words "during the life of A." were intended to be inserted and were omitted through inadvertence, it shall be construed as if they had been inserted.²⁰

4. But where the words of the devise to trustees are sufficient to create a fee, and the trustees have a discretion to deal with the estate as their own, or as the testator might have done, if living, they will be held to take a fee.²¹ Baron *Parke* here said, "Where an estate is given to trustees, all the trusts must, *primâ facie* at least, be performed by them by virtue and in respect of the estate vested

¹⁴ *Doe v. Bolton*, 11 Ad. & Ellis, 188.

¹⁵ *Adams v. Adams*, 6 Q. B. 860; *Lewin*, 178, and note (b).

¹⁶ By *Chambre, J.*, in *Doe v. Barthrop*, 5 Taunt. 382. See *Ward v. Burbury*, 18 Beav. 190.

¹⁷ *Wykham v. Wykham*, 11 East, 458.

¹⁸ *Curtis v. Price*, 12 Ves. 89, 99 et seq. by Sir *William Grant*, M. R.

¹⁹ *Colmore v. Tyndall*, 2 Y. & J. 605; *Lewis v. Rees*, 3 K. & J. 132.

²⁰ *Beaumont v. Marquis of Salisbury*, 19 Beav. 198.

²¹ *Watson v. Pearson*, 2 Exch. 581.

in them. The fee is in terms devised to them, and it would be a very strained and artificial construction to hold first that the natural meaning of the words is to be cut down, because they would give an estate more extensive than the trust required, and then when the trust does in fact require the whole fee-simple, to hold that that must be supplied by way of power defeating the estate to the subsequent devisees, and not out of the interest of the trustees." And the same rule seems to have been followed in later cases.²² The English Statute of Wills²³ has undertaken to deal with these questions to some extent, but as is not uncommon in such cases, the precise effect of the statute upon the existing law and the extent and direction of the change thereby effected seems not altogether clear.²⁴

5. Where the devise is to two or more joint trustees, with power to fill vacancies, and declaring the newly appointed trustees shall have the same power as the original trustees, the same title will vest in such newly appointed ones as in the original body.²⁵

SECTION III.

HOW FAR THE TRUSTEE CAN TRANSFER THE LEGAL ESTATE AND THE EQUITIES EXISTING AGAINST THE TRANSFEREE.

1. The distinction in the cases where the trustee may convey the legal estate freed from the trust, and where not.
2. Creditors of trustee can assert no claim against trust estate.
3. But the mere legal estate is subject to same incidents as other legal estates.
4. What is requisite to pass mortgage estates.
5. The effect of conveying the trust estate.
6. How far the devisee may execute the trust.
7. How far the vendor of an estate contracted to be sold may devise the same.
8. In regard to actions at law trustee treated as owner.
9. What estates will be carried into the mass of the bankrupt's effects, by being left in his power, order, and disposition.

§ 79. 1. THE present well-established rule of law in regard to trust estates is, that where the trustee holds the trust estate for the purpose of sale and conversion into money, or with a power of

²² *Blagrove v. Blagrove*, 4 Exch. 550; *Rackham v. Siddall*, 1 Macn. & Gord. 607.

²³ 7 Wm. 4 & 1 Vic. c. 26.

²⁴ *Lewin*, 181.

²⁵ *Nat. W. Bank v. Eldridge*, 115 Mass. 424.

sale and conversion, any one who in good faith accepts such transfer upon adequate compensation will acquire a valid title. But if the trustee has no power of sale the purchaser will acquire no title unless he show that the purchase-money has been applied to the purposes of the trust. It is this which marks the true distinction between the cases, where the purchaser is bound to see to the application of the purchase-money and where he is not. For if the trustee has no power of sale, any transfer by him will be wholly inoperative, and the trust will attach to the trust property in the hands of the vendee the same as in the hands of the trustee, until it appears that the money paid by the vendee, to the full value of the trust property, has been applied to the purposes of the trust.

2. It follows of course, from the preceding propositions,¹ that creditors of the trustee have no claim upon trust property in the hands of the trustee.² It has been held that creditors do not stand upon the same equity in regard to trust property, in the hands of the debtor, which *bonâ fide* purchasers do.³ The English courts seem, at one time certainly, to have held that creditors may, at law, make valid title to trust property by levy upon the same.⁴ And it seems to be settled in the English courts, that the creditors of an executor cannot levy upon the assets in his hands.⁵ But the executor may treat the goods of the estate as his own, for such a length of time as to render them liable for his debts, either by levy or pledge.⁶

3. But in most respects the legal estate of trust property, both

¹ Ante, § 79, pl. 1.

² *Hart v. F. & M. Bank*, 33 Vt. 252, and cases cited; *Hackett v. Callender*, 32 id. 97. In the case first cited in this note, it was held, that notice to one dealing with the trust estate, in order to affect him with knowledge of the equities of the trust, need not be shown to come to the actual knowledge of the purchaser; but if it come to the knowledge of his agent while acting in another transaction, it will be presumed the agent communicated such knowledge to his principal. And the same rule was finally adopted by the Exchequer Chamber in *Dresser v. Norwood*, 17 C. B. N. s. 466, reversing the judgment below, 14 id. 574. If one take a promissory note of an executor payable to him as such, it will be notice of the trust to the person accepting the same. *Booyer v. Hodges*, 45 Miss. 78.

³ *Poor v. Woodburn*, 25 Vt. 234.

⁴ *Foley v. Burnell*, 1 Br. C. C. 278. . But see contra, *Ashurst, J.*, in *Farr v. Newman*, 4 T. R. 647; *Blake v. Done*, 7 H. & N. 465.

⁵ *Farr v. Newman*, 4 T. R. 621; *M'Leod v. Drummond*, 17 Ves. 152, 171.

⁶ *Quick v. Staines*, 1 B. & P. 293.

real and personal, is subject to the same incidents as an estate affected by no trust. Thus joint tenants in a trust estate may each receive the rents;⁷ and each may sever the tenancy by conveying his interest.⁸ And the trustee may also pass the legal estate by devise.⁹ But as we have before had occasion to say, trust estates will not commonly pass by mere general words, so long as there are other estates upon which such words may operate,¹⁰ or unless, in some way, there appear satisfactory grounds to infer positive intention that they should pass.¹¹ Thus a charge of debts or legacies upon a devise will exclude the intent to pass trust estates.¹² Thus a devise of all such real estates as were vested in the testator by way of mortgages, to be held by trustees for certain declared objects, was held not to embrace the legal estate in fee vested in the testator by way of trust.¹³ It is not easy to define in advance the precise terms which will indicate an intention to pass trust estates. But it may be said in general terms, that the use of any terms, either in regard to the interest of the testator or the use or expected use to which the devisee shall apply the estate, fairly indicating a purpose to pass only such estates as the testator held in his own right, will be held to limit the operation of the devise to such lands.¹⁴

4. In regard to mortgage estates in favor of the testator passing under a general devise, a somewhat different rule prevails. Inasmuch as the estate of the mortgagee is merely an incident of the debt, and ordinarily passes with it, in equity at least, it seems to have been considered that two facts were indispensable to the passing of the estate of the mortgagee by devise: 1st, that the words of the will should be broad enough to pass the legal estate of the mortgagee; and 2d, that the mortgage securities should constitute part of the devise, or bequest.¹⁵ And it will not affect the

⁷ *Townley v. Sherborn*, J. Bridgman, 35.

⁸ *Boursot v. Savage*, Law Rep. 2 Eq. 134.

⁹ *Lewin*, 184.

¹⁰ *Ante*, Vol. 2, § 24.

¹¹ *Braybroke v. Inskip*, 8 Vesey, 437.

¹² *Roe v. Reade*, 8 T. R. 118; *Leeds v. Munday*, 3 Ves. 348.

¹³ *Ex parte Morgan*, 10 Vesey, 101; *Ex parte Brettell*, 6 id. 577.

¹⁴ *Lewin*, 186, and cases cited, showing what particular expressions have or not been held sufficient to restrict the devise to lands held beneficially by the testator.

¹⁵ *Ex parte Barber*, 5 Sim. 451. See also here the comments of Vice-Chancellor *Shadwell* upon the grounds of distinction between this case and that

construction of a general devise in regard to passing estates held as mortgages, where the devise is broad enough to carry both the estate in the land and the securities, that the devise embraces a power of sale and also a charge for the payment of debts or legacies, or both. But it might be otherwise if the devise embraced special trusts inconsistent with the idea of passing mortgage estates.¹⁶

5. It is regarded as a general rule, that the trustee should not be held by mere construction to have conveyed the legal estate in any manner which constitutes a breach of trust. Therefore a general devise ought not to be held to embrace trust estates, where the conveyance will constitute unfaithfulness in the administration of the trust. And as a conveyance of the trust estate by the trustee, during his life, will constitute unfaithfulness and maladministration, inasmuch as the trust is of a fiduciary character and personal to the trustee, and the conveyance is a dereliction of duty or at least an abandonment of it, it will not be considered that such was the purpose of the trustee in executing a mere general conveyance of his estates in language broad enough to embrace the trust estate; but that will be excluded in the construction of the instrument of conveyance. And some judges have claimed that the same rule of construction should be applied to a devise, inasmuch as that is nothing but a conveyance to take effect at the decease of the testator.¹⁷ But it has been considered in later times that there is an essential difference in the two cases, inasmuch as one

of *Galliers v. Moss*, 9 B. & C. 267. See also *Mather v. Thomas*, 6 Sim. 115. Thus, the expression "*my real estate*" has been held insufficient for that purpose. *Braybroke v. Inskip*, 8 Vesey, 425. So a devise to one, his heirs and assigns, to and for his and their own proper use and benefit, was held not to have that effect. *Ex parte Shaw*, 8 Sim. 159. *Bainbridge v. Lord Ashburton*, 2 Y. & C. Exch. 347. So a direction that the devisee may dispose of the estate by will or otherwise, as she may think fit, has been held not to have that effect. *Ex parte Shaw*, *supra*. But a devise to the separate use of a woman will exclude the idea of a mere trust estate passing. But a devise to a woman and her heirs and assigns, for her and their own sole and absolute use, was held not to have that effect. *Lewis v. Mathews*, Law Rep. 2 Eq. 177. So devises in strict settlement will not pass trust estates. *Thompson v. Grant*, 4 Mad. 438. But most of the above cases would be considered more or less unsatisfactory in this country, we apprehend. Here it would require the highest degree of certainty to induce a court to adopt the view that one holding trust estates intended to deal them as his own.

¹⁶ *Lewin*, 187.

¹⁷ *Cooke v. Crawford*, 13 Sim. 98.

involves the dereliction of personal charge and the other does not.¹⁸ It is here decided where a trust is devolved upon three persons and the survivors of them, and upon their heirs and assigns or the executors or administrators of the last survivor, with no power to appoint new trustees, that the last surviving trustee commits no breach of trust by not suffering the estate to descend, and by devising it to proper persons upon the trusts to which it was subject in his hands. Mr. Lewin seems to suppose that the propriety of devising the trust estates will depend upon the fitness of the heir to execute the trust, where the deed of trust provides for the devolution of the trust upon him after the decease of the trustee, and that where the trustee attempts to divert the estate from him without sufficient reason, his estate will have to meet the expense of restoring the trust estate to its proper channel.¹⁹ But it seems to us that where the deed of settlement of the trust explicitly devolved it upon the heir, and gave the trustee no power to appoint new trustees or change the course of descent, that any change in the administration, by reason of the heir being an infant, feme covert, bankrupt, lunatic, or otherwise disqualified to act, should be made by application to a court of equity.

6. But it seems agreed on all hands, that the heir or devisee cannot execute the trust, even when the legal estate passes to him, unless that is consistent with the fair interpretation of the instrument creating the trust.²⁰ And where the legal estate is conveyed away from those who have power under the deed of settlement to execute the trust, this will compel the appointment of new trustees.²¹ But where the deed of settlement devolves the trust upon a trustee, his heirs or assigns, it has finally been considered that this implies that the trustee may devise the estate to any one he may deem more fit to execute the trust than the heir, and that such devisee may not only hold the legal estate, but also execute the trust.²²

7. But an estate contracted to be sold by the testator will pass

¹⁸ *Titley v. Wolstenholme*, 7 Beav. 435. See also *Macdonald v. Walker*, 14 Beav. 556; *Wilson v. Bennett*, 5 DeG. & Sm. 479.

¹⁹ Lewin, 189.

²⁰ *Cooke v. Crawford*, 13 Sim. 91; *Stevens v. Austen*, 7 Jur. n. s. 873.

²¹ *Re Burt's Estate*, 1 Drew. 319.

²² *Hall v. May*, 3 Kay & J. 585, by Vice-Chancellor Wood, the present Lord Chancellor *Hatherley*.

under a general devise of all his real and personal estate, notwithstanding the estate may be held by him in the nature of a trust for the vendee.²³ The Master of the Rolls, Sir *Thomas Plummer*, here points out the important feature brought into operation in the construction of general devises, so far as trust estates are concerned. He said, "The way of reasoning, with respect to trust estates, has been this, that the party, having no beneficial interest, it can hardly be considered his, for purposes of disposition; and to treat it as his own, would be quite inconsistent with its nature. He has no right to dispose of it, except by direction of his cestui que trust, or for the objects for which it is confided to him. When the devise is not consistent with the trust, to suppose he meant to pass it is to suppose that he was taking upon himself to do an act of injustice; this the court will not presume, and therefore says that he did not intend to include it. To a certain degree the same reasoning applies here; the contract to sell is a disposition of the estate, and by it the vendor parts with his right and dominion over it. It is in equity no longer his; he is considered constructively to be a trustee of the estate for the purchaser, and the latter as a trustee of the purchase-money for him. They are so considered by construction only; but in many instances the court acts upon that notion, as between the heir and executors of the vendor and purchaser, if they die before the sale is completed, and in giving the [vendor] the right of disposing of it, by a subsequent will, in the same manner as other real estate." And the learned judge goes on to show that the vendor of the estate under such circumstances is only a trustee sub-modo, but in other respects is the substantial owner of the estate until the purchase-money is ready, and then only a trustee of the estate and the cestui que trust as to the purchase-money, so that in regard to each he is the owner and trustee in succession, and may therefore justly be regarded as entitled to dispose of it by will.

8. In regard to all actions at law for the recovery of the estate held in trust, the trustee is the party to sue, and the cestui que trust is not known in the action.²⁴ And the trustee may in some cases recover the trust estate even as against the cestui que trust.²⁵ So the trustee will be allowed to prove the debt against a debtor to

²³ *Wall v. Bright*, 1 J. & W. 494, 500; *Read v. Read*, 8 T. R. 118.

²⁴ *Gibson v. Winter*, 5 B. & Ad. 96; *May v. Taylor*, 6 M. & Gr. 261; *Lewin*, 190.

²⁵ *Beach v. Beach*, 14 Vt. 28.

the trust who becomes bankrupt.²⁶ And the trustee is liable to be rated for the payment of taxes on account of the trust estate.²⁷ And where a trustee holds shares in a joint-stock company he will be liable for all dues, and may be treated by the company in all respects as the owner, notwithstanding his character of trustee appear upon the books of the company.²⁸ But in case of the bankruptcy of the trustee his assignees will take no interest in the trust estate, but only in such estates, real and personal, as the bankrupt held in his own right, both legally and equitably.²⁹ And where the trust estate has been converted into other property, even by a breach of trust, so that the trustee has thereby made the property his own and himself debtor for the amount, at the election of the cestui que trust, it has been argued, that the assignee in bankruptcy may hold the same against the cestui que trust. But as the latter has an election against the trustee, whether to follow the trust estate or treat the trustee as debtor, he may fairly claim to do the same against the assignee.³⁰ Where the legal title does not pass to the assignee, but he withholds the custody of the trust estate, the trustee is the proper party to bring suit, although bankrupt, as he holds the legal estate.³¹ But it would seem, both upon principle and the authorities,³¹ that the cestui que trust might maintain a bill in equity in his own name for redress in such cases, and the restoration of the trust property and the appointment of new trustees in the place of those become bankrupt. But it seems to be well settled that where the trust property has become so amalgamated with the general estate of the bankrupt, that it cannot be identified or traced, the cestui que trust has no other remedy but to come in as a general creditor and prove his claim.³² And even funds once mixed with the general funds of the trustee and then separated by him will go to the cestui que trust.³³

²⁶ *Ex parte Green*, 2 Deac. & Chit. 116.

²⁷ *Queen v. Sterry*, 12 Ad. & Ellis, 84.

²⁸ *Re Phoenix Life Assur. Co.*, 2 J. & H. 229.

²⁹ *Scott v. Surman*, Willes, 402.

³⁰ *Taylor v. Plumer*, 3 M. & S. 562, 574, by Lord *Ellenborough*, Ch. J.
S. P. Cook v. Tullis, 18 Wall. 332.

³¹ *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40. See also *Bauerman v. Radenius*, 7 T. R. 663, by Lord *Kenyon*, Ch. J.

³² Lord *Hardwicke*, Chancellor, in *Ex parte Dumas*, 1 Atk. 232, 234. See also *Ryall v. Rolle*, 1 Atk. 172; *Scott v. Surman*, Willes, 403, 404.

³³ *Sayers ex parte*, 5 Vesey, 169, 173, by Lord *Loughborough*.

9. The English statute⁸⁴ provides, as have all English statutes upon the subject for a long period of time, that if the bankrupt, at the time of his bankruptcy, "shall by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he is the reputed owner," the same shall be treated as part of the bankrupt effects, for the benefit of the general creditors. But it has been held that this will not apply to any estate, where the nature of the title sufficiently accounts for the possession being in the bankrupt, such as estates in trust.⁸⁵ But where the trustee has the goods with power of sale, he may retain them so long that they will be regarded as coming within the above provision of the English statute.⁸⁶ The statute does not apply to the case of executors and administrators,⁸⁷ unless or until they lose the character of such trustees and come to hold the trust property in the capacity of owners.⁸⁸ This rule of the statutory forfeiture as to goods in "the possession, order and disposition of the bankrupt" does not apply to goods in the possession of factors,⁸⁹ or commission merchants, or where a chose in action is merely deposited with the bankrupt, as collateral security, but with no present power to receive payment of the same.⁴⁰ Nor will the statute operate a forfeiture of the goods of an owner, who is ignorant of his being the owner.⁴¹ Some question has been made how far the trustee is to be treated as the true owner of trust property for the purposes of the forfeiture clause in the English bankrupt law above. But in *Darby v. Smith*, assignee,⁴² the trustee was so treated, and there seems no injustice

⁸⁴ 12 & 13 Vic. c. 106, § 125.

⁸⁵ *Copeman v. Gallant*, 1 P. Wms. 314; *Ex parte Martin*, 19 Vesey, 491.

⁸⁶ *Lewin*, 196, and cases cited.

⁸⁷ *Ex parte Marsh*, 1 Atk. 158; *Joy v. Campbell*, 1 Sch. & Lef. 328.

⁸⁸ *Fox v. Fisher*, 3 B. & Ald. 135.

⁸⁹ *Mace v. Cadell*, Cowp. 232.

⁴⁰ *Gibson v. Overbury*, 7 M. & W. 555.

⁴¹ *Re Rawbone's Trust*, 3 Kay & J. 300, 476.

⁴² 8 T. R. 82. But here the trustee held the goods under a contract of sale. See also *Walker v. Walker*, 9 Wall. 743, where the following points were determined. A husband may be chargeable as trustee with the income of his wife's separate property, and if he have received it from her to invest it for her, and have not invested it, he will be so charged at her suit, whether the income be of property which he had settled upon her, or be income from some other separate property of hers. The Federal courts, where they have jurisdiction, will enforce, for the furtherance of justice, the same rules in the adjustment of

in so regarding him, so far as his own responsibility is concerned. But where the trustee is himself not responsible, there would be great injustice in allowing trust property to go into the mass of the estate for the misconduct of the trustee; and such a course is not in accordance with the general current of decisions upon the subject of trusts.

SECTION IV.

HOW FAR ONE TAKING THE ESTATE IS BOUND BY THE TRUST.

1. Summary of the points affecting the trust estate in the hands of devisee, vendee, or other assignee.

§ 80. 1. FROM what has been already said, it will be obvious, that all who take the trust estate by purchase, devise, or otherwise from the trustee, will hold it subject to the trust, unless, where they have actually paid adequate and full consideration for it, and have made the purchase in ignorance of the trust and of all circumstances which might have led them to discover the character of the estate, if they had made proper inquiry. The purchaser of trust property, with knowledge of the trust, either actual or constructive, — and where he buys at a merely nominal sum, or one greatly below the value, it is the same, — makes himself responsible to the same extent as the trustee; in other words he becomes himself trustee by consenting to accept the trust estate.¹ But a

claims against ancillary executors, that the local courts would do in favor of their own citizens. A widow, by being a mere formal party to a deed of compromise between the heirs-at-law of a decedent and his residuary devisees, by which a specific sum is given to the former and the residue of the estate to the latter, does not estop herself upon coming upon the estate with a claim for separate moneys of hers, received by her husband to invest for her, but which he did not so invest; she having done nothing to conceal her claim from the residuary devisees, and the "residue" which the heirs surrendered having been a residue after the proper settlement of the estate. Nor does she estop herself from asserting such a claim against her husband's executors, by her acceptance of a provision under his will which makes a limited provision for her, to be received with income under a certain trust deed, in satisfaction of dower. The estate of a husband, who had maltreated his wife, and obtained from her the income of her separate property under a promise to invest it, was charged after his death with interest, compounded annually, through a long term of years, and deprived of all commissions for services as trustee.

¹ Lewin, 198, and cases cited.

disseisor is not bound by the trust, he not claiming his title under the trustee, but by his own tortious act in opposition to the trustee and his rights.²

SECTION V.

HOW FAR COURTS OF EQUITY WILL CONTROL THE TRUSTEE. TRUST POWERS. POWERS IMPLIED BY THE COURTS.

1. Cases of mixture of trust and power.
2. Distinguished from a trust to which a power is annexed.

§ 81. 1. MR. LEWIN¹ alludes to the frequent mention in the books of a *mixture of trust and power*,² in which it is well settled the courts cannot control the trustee as to his mode of action, when that, by the terms of the trust, is left wholly to his own discretion. But in such case, where the instrument establishing the trust is sufficiently definite to show satisfactorily that a trust was clearly imposed, the court will so far control the will of the trustee as to require him to act, and not suffer the purpose of the trust to wholly fail by reason of the indifference of the trustee or his disregard of incumbent duty. In *Gower v. Mainwaring*,² Lord *Hardwicke* says, that where the discretion of the trustee is to be exercised according to facts and circumstances, "the court can make the judgment as well as the trustees; and when informed by evidence of the necessity, can judge what is equitable and just on this necessity." This will perhaps define, as clearly as can well be done, the exact limit of the power of courts of equity in regard to effecting the execution of trusts. If the trust is satisfactorily established, courts of equity will always enforce the performance of the duty of the trustee, where one exists; and where there is a want of the trustee, either by one never having been appointed, or having for any reason failed to be now in condition to act, will supply the defect by appointing one, and requiring the appointee to exercise the duty. And in many cases, where the duty of the trustee is clearly defined, as in merely ministerial trusts, the court will control the action of the trustee. And this may be done also by the court in

² Lewin, 202, 203.

¹ Lewin, 119.

² *Cole v. Wade*, 16 Ves. 43; *Gower v. Mainwaring*, 2 Ves. Sen. 89.

that class of trusts where the discretion of the trustee is to be exercised upon facts and circumstances as susceptible of being shown to the court as to the trustee, as suggested by Lord *Hardwicke*.³

2. But the mixture of trust and power just commented upon, is not the same, in all respects, with a trust to which a power is annexed; as where the trustee is empowered to convert the trust property into money, or other forms of investment as security, or in any other mode to deal with the trust property, in his discretion. In such cases the power is one resting solely in the discretion of the trustee, and may be exercised or not as he may deem expedient, and he is not subject to any supervision or control of the courts in regard to the matter, unless, as is said in the books, his abstaining from the exercise of the power may proceed from a fraudulent purpose, or be destructive of the purposes of the trust.⁴

³ *Supra*. See *Plymouth v. Shackford*, 46 N. H. 423.

⁴ *Lewin*, 19.

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disclaimer.

(See TRUSTS.)

pur autre vie.

(See ESTATE.)

of will, settled by probate.

(See PROBATE OF WILLS.)

WRIT OF ERROR,

who may bring, 211.

